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Vol. V

(44)

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, [redacted] 1920

No. [redacted]101

THE COCA-COLA COMPANY, PETITIONER,

vs.

THE KOKE COMPANY OF AMERICA.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

PETITION FOR CERTIORARI FILED APRIL 30, 1919.

CERTIORARI AND RETURN FILED JULY 21, 1919.

(27,093)

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I do not know anybody that worked for Ensley and Moody. Right along there I had an interest with Schuyler and he went out of business, and I had more room than I needed, and they moved this plant when they bought it to the back end of my place of business. That was 15 South 20th St.; I could not say under what name they did business I do not remember now. They were bottling Celery-Cola and some of my other specialties, I do not remember whether they bottled Koke or not. I presume I furnished labels for Celery-Cola at that time. I did not furnish the crown, they would buy that from the manufacturer of crowns. They got them from the Crown Cork and Seal Company. I do not remember that I furnished them, I may have furnished labels at that time. I would not say where I got these labels from. We got them everywhere I happened to be; we had some printed all around, no particular place. The American Label Works of Nashville, Tennessee, printed a good per cent of our labels. I think that was in 1903. I think they printed Koke labels there. If we had any bottled I would not say. They did a little later on. About 1900 I was shipping Koke, and Koke crowns, advertising matter and labels to a Mr. McGraw at Gladsen, Alabama. As a rule I carried crowns, but not bottles. I had also some plain crowns. I do not know just when the Koke decorated crowns came out. I do not think we got the crowns; I think he got only the labels, if he got crowns they were plain; he did not get any with the word Koke on

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them. I sent him Koke labels. They might have been made at American Label Company or from most any place you find printing labels, cheaply. **[1240]** Those labels had Koke on them in block. I do not remember when I first took up the script. We did not pay much attention; we use the script to-day and the block to-day. I could not say for certain when I took up the script because my boys were on the road and lots of labels were printed and shipped to people I never did see. I do not think I made that first cut made up of Koke; I think the printer Boylin in Nashville had that done. I was a good customer and my boys were selling labels all over the country. He was on the road and represented the label house on commission basis, and sold to everybody all sorts of labels. The first label was block; I do not know whether it was a cut or set up; they were this block type of all sizes and it was not necessary to have a cut, the script came out after the block. I would not say when it was made (#6 & #7). I had lots and lots of cuts made for all different flavors and as a rule he would have them made and render me a bill for it, but when that was made I could not say (indicating #7). I could not say when I first commenced using the Koke in the form displayed on #7. I used the block letters in 1903 I think. My son was on the road jobbing; I cannot just recall but he sold, he may have had some of those labels and some others of the printer in Nashville. I cannot say about that. I know a very small per cent of the

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people whom he sold. He did not restrict them to any territory and they sold it everywhere. I do not remember as far back as 1901 on the script; I think we were using the block. I would not say for certain that is I individually remember the block but I do remember the script just when the printer made it out I do not know. I have seen that script prior to 1903. I do not know whether it was a label Mr. Boylin sent me but I took that drawing and I had this big cut made from that. I had that made in about 1909. I mean in that large shape in the script as shown in Exhibit #7. That is my positive recollection I may have seen it before. I have seen that script prior to 1903. I had heard that the Murfreesboro people had that Koke registered. I would not say Exhibit #7 was new and original with me and some of my associates. I think the American Label Works were the first people that sent me the first one, I saw it—they may have made it just for me; they may have made that cut for the Murfreesboro people, I do not know about that. I never saw the label of the Murfreesboro **[1241]** Bottling Works, until I went over there, that is the first time I had seen that label. I cannot describe it; I was not there but one day and did not pay enough attention to it to describe it, this describes it. I was not there after the label especially, I was after the trademark, they did not turn the label over to me. The label I have adopted down in New Orleans, my printer got up, the artist got it up. I only recognize the word Koke (indicating Exhibit #24)

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as it appears there, I do not remember anything about the label. I did not deliberately copy the label at New Orleans; I did not have that in view at all. I was having my own labels printed right then. I was using that label long before I heard of the Murfreesboro people having a trademark. I was using this script label before I heard of the Murfreesboro label. I remember further back than 1909. Some of my customers I am satisfied used it further back. Well, if my label man in Nashville printed a lot of labels and my son ordered them out to people they sold goods I am satisfied that is when it started so far as I am concerned; I was not on the road, I was not selling the goods. I do know that script was possibly used by us prior to the time I mentioned, and made this big label, but just when or where I could not say. We used the block type around 1903, and using it yet. Before I bought this bottling plant I had gone in with Mr. Schuyler. Mr. Schuyler was in the vinegar and cider business and I bought in with him. I exchanged some of my stock in the oil business for the purchase in to the Schuyler business. That was on 20th Street. After I bought in with Mr. Schuyler in the vinegar business I bought out Ensley and Moody. I do not think Schuyler was making anything else besides vinegar. I think I moved from Nashville there and from St. Louis there. Right along then was when Mr. Schuyler was falling down and I had to go down and take the whole thing. I took over the vinegar business and took over the bottling business and

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united them, under ths name of J. C. Mayfield Manufacturing Company. We ran along while under that name on 20th Street. **[1242]**

Q. 919. I will get to that; the J. C. Mayfield Manufacturing Company was on 20th Street, this bottling—they were bottling what? A. They bottled everything I was then introducing, all my different flavors.

Q. 920. They bottled Koke? A. Koke, Celery-Cola, Vigo, Pepsi-Nola, and all the soda-water flavors, used the bottles those other people used. They were using a bottle that required a crown cork. We had a label on the Koke bottle, on this label **[1243]** was "drink Koke," "drink delicious Koke," or something like that, I do not remember the exact words. I do not remember whether it had the name of the concern or not, it was a very cheap label. That was around 1904, I think, a Nashville concern was making the labels. I used Koke in the block type. I had my sons there then, the two oldest, and I had some traveling men from time to time. I had one fellow named Benjamin, his line though was vinegar. My sons were on the road for themselves; they were the traveling men for the different flavors and the bottling business. I think I had stationery, I do not remember what was on that stationery. These draymen and syrup mixers are men that come and go; I do not remember who I employed there regularly; there was an old fellow named Smith that did the bottling, I do not know his initials. We called him Ira Smith, that was a

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nickname I believe. I believe he was in Birmingham the last I heard of him. I saw him when I was there a short time ago. I do not think he testified for me in this case. I saw him on the street in Birmingham just as I went up, just as we were leaving. I kept the books myself, we may have had a bookkeeper, I was there all the time looking after them. I believe I did have an old man named Garrett. I have not seen the old man in six or seven years. I do not know as he is living. We had a lot of negroes come in and go out; we had a young man named Montgomery, and we had another young man that helped us around there, I think his name was Levender Edwards. About 1904 the plain crowns came cheaper, and while I was labeling it was simply unnecessary to pay more for decorated crowns; it seems to me I used the plain crowns. I was buying the crowns from the Crown Cork and Seal Company; they were the only people who were manufacturing them. I cannot say whether I had Koke or Celery-Cola on the crown or not. We ran along there as the J. C. Mayfield Manufacturing Company at 20th Street, possibly twelve months, along there somewhere. Somewhere along in 1905 we changed the name. I could not say exactly, but about a year thereafter it was in 1905, maybe a little later, maybe 1906. That was the same bunch employed by the Celery Cola Company, we did not change then but the name of the business. I do not remember whether a colored man by the name of Brewer was employed by me or not. I do not

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[1244] remember any man by that name. I continued the same business, Koke and Celery-Cola, and used the labels Koke and Celery-Cola. As to our stationery I may have mentioned a few of our products. We tried to get up a nice letter-head; we left it as a rule to the artist to get up. Inasmuch as this name Celery-Cola I presume it mentioned that, it did not mention Koke, I would not say. The place of business first was on Morris Avenue. I remember this (indicating Exhibit #25) that was not the Celery Cola Company, a corporation at that time, we put it into a corporation later on. I believe it was an Alabama corporation. The Celery-Cola Company had the bottling right. This was my business and the other was the Birmingham Celery-Cola Bottling Company. I made the flavors, the Celery-Cola Company never did, they were licensees. I always got a profit on my goods. I continuously made up the flavors, at that time. I made the general line of flavors that they used there. I made my lemon and orange, and put up a general line of soft drinks aside from my specialties. I was making up all my flavors. Sometimes somebody may have run out and got a gallon of flavoring from somebody else.

Q. 994. You made Koke flavoring and Celery-Cola? A. Yes, sir.

Q. 995. And you are the only one that made that up to the Van Dusen time?

A. Well, my boys made it.

Q. 996. You mean Steve?

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A. Well, Steve did and some of the other boys.

[1245]

What I considered the keynote of the thing was flavor, and the boys always had a gallon or two of extract, and it was an easy matter to do the mixing of the other things. The Celery-Cola Company was simply a company that handled my products that I had made for them; they did in the bottling business. That bottling business was located on Morris Avenue, and handled my Koke and flavors too. The same bunch were employed, that is they were with me then, the boys were there. My youngest son comes in somewhere along there, and myself and the bottle washers, that is about all I remember was around the plant. In our advertising during that period we did not say everything, we just called it by its name. I remember the hanger we had. It was "Drink Delicious—" whatever the drink was—"Celery-Cola 5 cents at fountains, 5 cents in bottles, Drink Delicious Koke 5 cents," we would have it in different shapes of that form, soda-fountain hangers, hangers for grocery stores, something like 5 by 6 or 7, not too large **[1246]** to be in the way, but large enough to show up well, those we sent out promiscuously so as to be hung around the places of business and we had different lines of advertising, other things we would use. We had umbrellas. I am not right sure that we had the wagon umbrellas. We may have had. That might have been just as we changed the name to Celery-Cola, I was going to push that altogether

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and we might not have had anything but Celery-Cola. I know this we made up our minds to push Celery-Cola and let the others take care of what we had. From 1903 to '8 Celery-Cola was advertised and Koke also. We had those little hangers we shipped our soda-water largely in sugar barrels. We packed like we do here, but we put a great many more because we had small bottles and we always put in some of the hangers on top of the barrel. We had them in every shipment and sometimes if it was a bottler, we would send him advertisements of the kind he was using those who were bottling Koke got Koke, and only people who were handling Celery-Cola got Celery-Cola advertising, only we had not as much of it, as we have now, as big a variety, but we had quite a lot. Along there the hanger was about the only thing we had for Koke. I would have different hangers printed; one batch I would have printed in Nashville, we had some printed in Birmingham. Any printer could print them, they were glad to get the call. Before I went to Birmingham I had about the same class of hangers. We got them from anywhere we happened to be. In 1900 I might have carried some Koke hangers over there from Atlanta. I could not tell you about the advertising I had for Koke from the time I got up Koke; most of it was the labels and hangers, sent out to the people that bought the goods. I sent the labels and hangers to the people that bought the goods. I sent them to Tyner and Edmondson, and whoever I sold it too. The first ad-

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vertising for Koke we got out in the beginning in 1888. I remember carrying them to some places. I would not say when he printed them but the Nashville printer, Boylin, did most of my labels of that class of work. I bought from him away back yonder in 1900, about 1900 it seems to me when I first went thru Nashville he was there **[1247]** making them. In fact I reckon he does only make a specialty of labels but he is not doing so now because bottlers as a rule have discarded labels altogether and use only the decorated crowns. This advertising I brought in yesterday, I used that kind as I say for Celery-Cola because at that period I was using them for Celery-Cola I was pushing that. I would not say about Koke, all we used was a lot of signs and hangers. We used them around the grocery stores, fountains and distributed them around among the wagons. I did not mention when we commenced with our free tickets, that they were always good for a glass of Celery-Cola or Koke. I think I gave out free tickets before 1910 for Koke or Celery-Cola. I cannot tell you when we had those printed, they were a cheap ticket we introduced along—they were I think I had a ticket, to the best of my recollection, it was printed with Celery-Cola and the other side had Koke. That was at Birmingham. It seems to me it was around that 1903 period. I might have had some free tickets it seems to me that we had some in Atlanta, that was Koke on those in Atlanta. We decided to take Koke and we had some hangers made for soda-

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fountains, pretty nice hangers. Mr. Bloodworth got them in Atlanta, I do not know what establishment. They were about a two colored hanger, is my recollection. It seems to me that I had advertising like that placed in evidence yesterday and part of this morning in 1908 and '9 for Koke. I had calendars they have always been cheap, good class of advertising, and I had a lot of Koke calenders. I had some of them in Birmingham prior to 1908. It was during the period I had just commenced in 1903 when I went back there. Wherever I had a bottler like now, if I have a bottler for Koke I have calendars gotten up for him. If I had calendars as Mr. McGraw has testified, I evidently got calendars, I made it a rule to get calendars. I do not know who made those calendars that is too far back. I remember the class of advertising, but I did not charge by memory with it particularly. I had some calendars made in the last sixty or ninety days, I do not know who made those, I will have to sorty look that up, I bought them from a local dealer and his **[1248]** house shipped direct, I believe they came from Chicago and Buffalo, I do not know without looking at the invoices where the calendars were from. I got them up in 1913, 1912, and 1911. I could not tell where I did get them and how many I got out back in 1912 unless I went to the records. I will try to look into that and see. If I kept one piece of all my advertising for the last 26 years this room would not hold it; I did not buy it to keep. The advertising that made up this sev-

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enty-five to one hundred thousand dollars I got right along from '87 to the present time. I could not say what proportion of this seventy or one hundred thousand dollars of advertising I got out before 1912 or '13. From 1900 up to the time I organized the Koke Company of America I would say the greater per cent of it was Celery-Cola. From 1890 to 1900, the greater per cent of it was Koke; I could not say how much for each period. Labels are not advertising to the public, but all that costs money, anything that holds your name out to the public is advertising to popularize that product for you. I would not say the greater percentage of that has been since I organized the Koke Company of America. I call them licensees places that have started at Ft. Worth, Dallas and here, do their own advertising. I do not know how much they have done at these different places. I reckoned on that as some of it. How much these people have spent on it, I do not know, I have heard them say that they had spent thousands of dollars. We spent considerable, it would be guess-work. That particular line of samples may come in that recent date but we had some stuff prior to that. Knowing the Dallas office did their own advertising of course I do not know what they paid until I came here; I do not know where this office advertised or bought. I came here in 1913. In 1913 I do not know of anything outside of what I bought from a man named U. O. Postum. He is located some place in Illinois. I bought quite a lot of calendars, I think some fans

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and blotters. I could not say how much, a good deal then. I make it a rule to buy from every man that comes along. I give them all a little business if I am in the market. I bought from a local **[1249]** representative here, a Mr. Goldsmith, and another Mr. Juhl, and two or three others that I cannot recall. Of course most of the goods were shipped from other representatives, but I do not recall the names. I did not take up any receipts; my son looked after that. I think I have the receipt for the 1913 advertising since I was here. I will dig those up and make a point to see if I can find them. I have been all over the southern States. My boys and I would buy it and use it and have it printed at different places. We had quite a lot of printing done in Nashville by the American Label Works. While in Birmingham we had some banners. We gave one of the theaters there a little ad on its program. We had these outdoor signs. Maybe some are tin, that might not be destroyed. Those streamers that we had so much fun over in Birmingham were made right along there in 1903 or '4, I believe from a firm in Coshocton, Ohio, the Meek and Beach Company. The Koke Company at Shreveport was formed in 1910. We were in business prior to that, we were in business in 1910 and this corporation was worked up a little later. A fellow by the name of Whitmire and I started it off. He did the mixing and shipping. There were other parties interested but Whitmire was about the only party that put in any money. I sold to Mr. Whitmire and his

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associate from St. Louis. I never met his associate. They sold nothing but Koke. I was president of the Koke Company Limited of Shreveport. I started business in Shreveport right after Christmas, January or February, of 1910. Before we organized we called it the Koke Company. The corporation was organized later in the summer of 1910. I was president and principal stockholder. My business in fact. The organization was never completed, I had control of it completely. The corporation lasted about three or four months. Altogether we may have been in Shreveport a year. I could not give the month when the corporation was organized. W. L. Bidding lived in Sherman, Texas. He was a druggist. I do not know what his address was down there it is a small town. I do not know if they have any street numbers. It was on the east side of the square, the courthouse was in the square and the stores all around. **[1250]** I first met him when I first heard of his trouble, I went up there and met him on that trip. I went to buy him out. I could not say the date of that, the papers will show. He had the label registered quite a while, since '98, and the first I paid any attention was when he filed his papers in Washington for a trademark based on this registered label. I only saw the label that he turned over to me. He told me the product that label was put on was the Koke beverage the same as I made. He did not tell how it was made up, he said it was a soda-fountain beverage. I bought the trademark, that registered

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label, and whatever he had in the way of registered trade, he told me he would not manufacture any more from that day and he did give me an order for my goods, an order for Koke. I did not buy his drug-store. He said he made syrup and sold it as Koke. I did not buy any formula from him. I did not buy his drug-store, or lay great stress on how much he had done in business, but I bought it more to get it out of the way, it was a cloud on my title, and that was the most satisfactory way to get rid of it. I bought the trademark and registration, and the business, and I got the business whatever he had. He told me of customers that I was already selling Koke to. I did not take over any tangible property, nor any labels, he did not give me a formula. I had my own formula. I do not know anything about this chemical combination he had used the name Koke on. You know more about those interferences than I do, Mr. Bidding undertook to change his registered label to a registered trademark. And I had the Murfreesboro registration of record in my name and I received notice of Mr. Bidding's application, and that is where I got hold of it. I got this assignment from Bidding, rather than fight it out. My attorney said we could beat it out and thought it best not to buy it. I said I thought it was the cheapest, quickest and most satisfactory way. I found out about Bidding after I had bought the Murfreesboro registration and found that an interference was entered at the Patent Office between the Bidding registration and the

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Murfreesboro registration. The assignment was filed and the trademark was issued to the Koke Company of America. I did not get any formula when I bought the Murfreesboro trademark. Mr. Bidding gave me his **[1251]** name and his business, he told me in fact that he had been making his own, I got that much if I did not get anything more. I got a customer and if there was any others he had been selling, he did not sell thereafter. Some I was already selling and others I sold later. I could not recall any of those customers. They live in Texas. He only mentioned a few, two or three around there. He said he had done considerable advertising, I don't know what kind. He did not turn over any advertising matter to me. I cannot give you the names of two or three customers he gave me. The trademark was the principal thing and to get his personal business, I wanted him for a customer, and the influence he might have. I would not say I was in Dallas, Texas, on May 6, 1913. I have been there whooping the business, but I would not say any particular date, I have been in Texas at various times. I did not make the statement on or about that time that there was no money in advertising as the Coca-Cola people advertised for me. Never in my life, nor did I state that I was entitled to this advertising, the Coca-Cola advertising, on account of the three-fourths interest in their formula. I have no recollection of having made any such statement to anybody at any time. I always felt and I do to-day that I have an interest

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in Coca-Cola and whatever they made up to the time I was barred by limitation I figured I was entitled to it. I stopped using this name Coca-Cola in the spring of '88, in April sometime. I have never used it since. Exhibit #26 is some of our advertising. Exhibit #27 is some of ours too; Exhibit #28 is some more; Exhibit #29 is also. Dr. Pemberton died about August 1888. I believe he is buried in Columbus, Georgia. I was living in Atlanta in 1895, 1896, 1897, and I was there part of 1899, the last part. I got there in the early summer, or latter part of the spring, of '99. I do not remember the Granite Hotel. Where the pencil factory is now that was a livery-stable. I did not stay in the stable. I do not think I was on Auburn Avenue in '98. I might have been thru Atlanta in 1900. I did not live in Atlanta in 1901. I expect I was in Nashville. I did not have a gentleman by the name of W. G Ferguson connected with me in the J. C. Mayfield Manufacturing Company. I knew a Ferguson connected with Diehl and Lord, as bookkeeper. He was not connected **[1252]** with me. H. L. Brittian was in St. Louis. He was not the general manager of the Mayfield Manufacturing Company in Nashville in 1902. We may have made application for a charter along there but Mr. Ferguson was never connected with the business. I was not in an iron manufacturer nor had anything to do with iron at that time. I might have been in Nashville in 1903, I was in Birmingham. We were located at 1503 North High St. We had our office

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in the Vanderbilt Building. 1503 N. High St., was a boarding-house, where I roomed and took my meals, I had no office there. Mr. J. H. Zarich was secretary and treasurer of the Mayfield Oil Co., and manager. And Charles Sikes, vice-president, that is my recollection. I may have gone to Nashville in 1904 once in a while I may have got business there. I have not had a place I could call home for a quarter century. I have lived in boarding-houses, hotels and restaurants, where I thought it best to push my Koke. Zarich was connected with the Mayfield Manufacturing Company. I do not remember his position I believe he was secretary. The organization at Little Rock was just in the family, it never amounted to anything, we did not push it. I do not believe there was ever any stock issued on that, we may have met and accepted the charter but never did business as a corporation. There is no Atlantic Koke Company. I made a contract with a man named McCoy of St. Louis. In that contract he had authority to go over some offices, whether he has ever been duly organized in any place or anything I do not know. Exhibit #30, that is the first time I ever saw that card. I never saw one like it. The Central Koke Company is not a corporation, it is doing business. I may have given McCoy one of these Pemberton certificates, but as to the complete history of Koke, I never have. . .

(Exhibit #31.) I will say in the beginning I never authorized this.

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Mr. LITTLETON.—You ought to ask me about that; I can tell you about it.

Mr. HIRSCH.—Do you know about it.

Mr. LITTLETON.—Yes, I did not know it until after it was done. I have scanned over this, this is the first time I ever saw that, that is not true. I heard of a man named Holland mentioned here but I never heard of a man named Venable, Lowndes or anybody ever having any interest or being connected in any way with Dr. Pemberton. Some things here about Mayfield being president of the [1253] Koke Company, that is true. It says Dr. Pemberton without the knowledge of his partners transferred to Walker, Candler & Co., of Atlanta—I never knew anything about that, nor did I impart this information to Mr. McCoy, he got a hold of some one's literature. I certainly didn't have anything like that. Exhibit #32 seems to be an exact copy of the one we put in. We applied for this but I have no recollection of ever having organized that. I cannot say I was in business in Richmond, Virginia, and I can say no individually, I was not there, my sons were there, and it was a family affair. Exhibit #33, I never saw. It was something my boys got up out there, they were there part of two years, I have never been to Richmond.

Q. 129. I want to ask you if your first wife became Mrs. Diva Brown afterwards? A. Yes, sir.

Q. 1299. And Mrs. Diva Brown was around the plant in Atlanta, Georgia, she was Mrs. Mayfield at that time, and was around the plant in Atlanta,

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Georgia, was she not, when you first started to manufacture?

A. No, sir; she was not there in 1888.

Q. 1300. When did she start coming around the plant as I understand?

A. Well, she started when I went back there in 1903.

Q. 1301. 1903? A. I mean 1893. **[1254]**

Q. 1302. Well, did you go away from Atlanta before 1893?

A. I sent my wife away from there, and children, back to Roanoke, Alabama. My family were only there for a little while, the children in school. It was a cheaper place to live and after she got well they came back.

Q. 1303. In 1893?

A. She was not around the place, nobody ever seen her around there during the first business there, 1888 or 1889.

Q. 1304. Did she help manufacture around the plant at all?

A. She may have helped a little around with my son and Mr. Bloodworth, when we went back there I think she did, in '93 up to '94 or '5, along there.

Q. 1305. Was she familiar with this formula that you got from Doctor Pemberton?

A. Well, I could not answer that, she had opportunities helping around there to get familiar with it, and what a wife would have with a busband's business.

The formula for Coca-Cola was not disclosed by

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Dr. Pemberton to Mr. Murphy and Mr. Bloodworth, that I ever heard of. Q. I will ask you if you have ever seen or heard of—first if you have ever seen; Second if you have ever heard of; and third is the following true:—"In 1888 O. A. Murphy of Barnesville, Georgia, and J. C. Mayfield of Alabama and myself, bought Dr. Pemberton's formula including Coca-Cola. Mrs. D. Brown was then the wife of J. C. Mayfield. She was not known to us as a member of the Pemberton Medicine Company, but she spent considerable time in our laboratory and took a great deal of interest in our business. A few months after our purchase Dr. Pemberton stated that he had neglected to state to us at that time that he had sold the Coca-Cola formula [**1255**] to his son Charles Pemberton and Mr. Walker, and should not have been included in the sale. Dr. Pemberton's deed to his son and Walker was dated a few days before the one to us was. We used the same formula and called the goods Yum Yum, but failed to successfully introduce it. Signed: E. H. Bloodworth." Georgia, Fulton County, personally came before me E. H. Bloodworth, who says on oath that the above is true to the best of his knowledge and belief. Signed this 18th day of July, 1905, J. C. Bloodworth, N. P. and ex-officio J. P. 10626 G. M. District Fulton County, Georgia."

Mr. LITTLETON.—Just a minute; I want to enter an objection to all testimony that Mr. Hirsch is now reading into the record, asking if something occurred and then going on to describe the affidavit.

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We object to the affidavit as immaterial and incompetent.

Objection overruled and appeal prayed and granted.

I have seen the whole thing. It is not true. This is true that A. O. Murphy of Barnsville and J. C. Mayfield of Alabama were connected, but my wife had no connection whatever. Now, as to anything about his having said he deeded it to Walker and his son, that is not true. He stated to us, Bloodworth, Murphy and myself, who were the only partners, that he would have to give in to his son, but as to having previously done so, he had not, in fact, mentioned it. It is true that he died thereafter. It is not true that we shipped our goods as Yum Yum. We discussed it. And we did adopt the name of Koke. I have no recollection of having an ounce going out under a label of Yum Yum, there may have been a little but only a week or so while we were discussing it, that was not long. We may have sent out some along with Koke to see which went the best. I did not like the name because it sounded like a Chinese drink. Yum Yum was similar to Coca-Cola, Dr. Pemberton in discussing, said it was a Chinese drink but I did not like it for that reason. After Mrs. Diva Brown left me I have heard she went around the country claiming to have the original Coca-Cola formula and selling it. I do not know of but one instance where I have heard that she sold the formula, and she did, in 1905, try to get up some evidence whereby she could do something like that. She

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[1256] was making her own living and that was the way she had of doing it. I have heard of the suit against Mr. Keller but she did not discuss it with me. I did not give an affidavit or any testimony in that case at all. We got along; she was perfectly free to visit the children when she got ready and they could see and correspond with her. I raised the children and if she wanted to visit them I had no objections. I do not know whether or not she claimed to have sold the original people the original formula for Coca-Cola. That one is all I know of for sure, I do not try to dig into her private affairs. I have heard of Afri-Cola, I don't know whether or not that drink is made according to our formula.

Q. 1328. Do you know of a Mr. Rice of Memphis, Tennessee? A. I have heard of him.

Q. 1329. Do you know him? A. Yes, sir.

Q. 1330. Did he work for you?

A. Yes, for a while.

Q. 1331. Was not there some claim that he took your formula away with him? A. Yes, sir.

Q. 1332. Was he prosecuted for that?

Q. Yes, sir.

Q. 1333. He started that with your formula?

A. I do not know.

Q. 1334. But he was prosecuted?

A. I do not know, only about the case.

Q. 1335. You were not there at the hearing?

A. No, sir.

Q. 1336. In what capacity was he working for you? A. Bookkeeper.

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Q. 1337. Where?

A. When I had the plant on Morris Avenue. [1257]

That was the Celery Cola Company. I do not know whether Afri-Cola is still on the market or not. I do not remember Mr. Rice's initials. In Birmingham we sold, there was what you might call a prohibition territory, drink called hop ale. We sold considerable of that around over the country. Some people said it was not necessary to have a revenue license, but they did not cost much, so I took out a revenue license. I sold the phosphates and sodas that are common with the soda-waters and other syrups, my Koke, Celery Cola, and extracts, and bottled these goods, and Cider. I believe that was the line I had. Sherbets come under the head of phosphates. Sherbets were a little alcoholic to preserve them; you cannot make a flavoring of any kind without using alcohol. It was put in there largely for flavoring. We had to use it first in putting the essential oils. You have fluid extracts and patent medicines. And soda-water, there is not enough alcohol in soda-waters to keep them. The sweet or sugar preserves the syrup, and being water-tight in soda-water bottles that keeps them from fermenting. Lemon and orange flavors are made with alcohol. Mr. Gregory's initials were J. H. I bought an interest in the Gregory [1258] Vinegar Company in Birmingham; it belonged to Schuyler, whatever name it was running under it was Schuyler's business. My son was operating the J. C. Mayfield Manufacturing Company. I did not sell

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any of my interest in Mr. Schuyler's; I bought an interest; he sold his interest in the vinegar company. I sold some of my stock in the oil business. My son kept the books for the J. C. Mayfield Manufacturing Company at Nashville. I expect he had a stenographer. I cannot give you her name or his name; I cannot give you the name of any employee at that time of the J. C. Mayfield Manufacturing Company. He had a negro man there helping do the heavy work; I have forgotten the name, his first name was George. When I would go back and have charge of the office my son would travel; I did not stay in the oil field all the time.

Q. 1371. You state positively that during the time you were in Nashville the J. C. Mayfield Manufacturing Company manufactured Koke?

A. Yes, they manufactured Koke. [1259] I could not say for sure who bottled it at that time. I know old man McGraw was bottling there, but I have been unable to locate others; I know we have had others. Just now that is all I can remember. I shipped from Nashville to McGraw at Gadsen on the L. & N. and N. C. & St. L., about 1902 or '3. Out of Birmingham the railroad leading out of there North would be the Southern, I guess, or would you call it the N. C. or maybe the L. & N., I do not know just which it would go over. I was manufacturing vinegar in Birmingham, and also manufactured Koke, both syrup and extract. Exhibit #159, the October, 1914, number of the Southern Carbonator and Bottler, is a page ad the word K-o-k-e in script, and

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underneath it, Reg. U. S. Pat. Off., Dec. 27, 1898, No. 6752" That refers to one of my registrations in the office that I bought. I could not say which one the paper would show that we have here in evidence. The next is August 21, 1906, #55,878; I make the same answer to that as I did to the other, and the next is January 13, 1914, #94,869, that refers to the last one mentioned; if that is the last one, that must be the Bidding assignment that went through. Reg. U. S. Pat. Off. June 1, 1907, No. 62,033, refers to the original issue by the department. This advertising in the papers that have been introduced goes largely to the bottlers. These are trade papers. "You can [1260] secure a continuous agency for Koke or Dope, without it costing you one cent." I mean by that I do not charge them for territory. "How can you supply your trade with Koke or Dope unless you buy it from us or our agents?" I mean that nobody, as I understand it, has the legal right to supply them with those beverages except myself. "We have the sole right to sell Koke or Dope and are protected in the use of these names by United States trademark registrations as shown above"; that is the proposition I make in this case, the name Koke or Dope or either or both, refer to, designate and distinguish our product exclusively. "Why buy imitations, when you can get the genuine Koke or Dope from us?" I have heard that bottlers would buy other cola beverages and sell it on calls for my goods. I regard it an infringement of my right under these registrations for a bottler or dealer to sell Coca-Cola in re-

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sponse to requests for Koke or Dope. "Keep your conscience clear, be at peace with the Lord, bottle Koke or Dope and you will enjoy health, happiness and prosperity, owing to the wonderful increase in your business." I mean just what it says, that is sell your customers the legalized drink, and Koke and Dope was the legalized drink. Koke and Dope is the same drink and produced by the Koke Company of America, and sold by its subsidaries. "Be at peace with the Lord," is a phrase I put in there; a fellow that obeys the laws of his country, as well as this law there is no reason why he should not be at peace; the Government makes the laws, gives us registrations and trade names, and if you sell what the Government legalized there is no reason why you should not be at peace. No one can interfere with them, if they live up to the laws, and the Government has given registration on the trademarks Koke and Dope which I now own and which a man sell Koke and Dope in response to request for our product without interference to his trade. I claim I have got the best drink on the market. [1261] And a man can do more business selling Koke and Dope than he can any other cola beverage, that is the prosperity end of it, and the further fact that it does not cost him quite as much as other cola beverages, and it is of uniform strength and the best I can make, and a man can do more business selling Koke and Dope than any other cola beverage on the market. I have heard of others that cost a little more. Coca-Cola costs more to the trade than Koke or Dope. The retail price in each

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instance is the same. The dealer will make more by the increase in business; it is a business proposition. **[1262]** I do not know of any other cola beverage that is sold to trade higher than Coca-Cola, or as much as Coca-Cola. That the dealer violates the law when he sells in response to requests for Koke or Dope, anything but the product of the Koke Company of America, I do not know as that is one of my arguments that I instruct our salesmen to make to the dealer in inducing them to buy our product. I tell our salesmen to sell our goods on their merits. The argument that I have made public in this advertisement is one inducement that is offered to the trade to buy our product; that is a business proposition. I do not know whether my traveling men used that direct language advertised in the trade papers. I got up those cards that our traveling men present to the trade. I do not think I made that same argument as on the card, that is the language (Complainant's Exhibit #9), reading: "Our customers will please notify us or the Industrial Surety Company of New York of any infringement on our trademark Koke or Dope, or of anyone substituting any other beverage for calls for Koke or Dope. This is a violation of the Federal Laws, and we will prosecute any person who will infringe on our rights to the full extent of the law." I got that card up. It is a fair inference or more than a fair inference from that language that I consider anyone substituting who sells in response to requests for Koke or Dope anything but the product of the Koke Company of

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America. By substituting I mean to sell a man one beverage when he has called for another. If he has a call for Coca-Cola and served Koke or Dope or *vice versa,* that is a substitution. I think that is unlawful and unfair. The Industrial Surety Company of New York is a company that looks after people who infringe on your trademark rights. I do not remember their address; I could not say what is the president's name or the name of any person connected with it. I did have a contract with this company; it has run out, maybe it has not expired. I do not know about them; I presume there is a lawyer connected with them. I do not know whether I have got their contract, but I can find their address on the correspondence. I will do that and let you have it. I have not brought any suits for the Koke Company of America for substitution, or any of any kind. I contend that I have the best cola drink on the market. [1263] My salesmen know it is better than Coca-Cola. In barrel lots we get a dollar a gallon, in smaller containers we get more. My opinion as an expert I think the terms Koke and Dope as used by the general public mean my product Koke. There may be cases where Dope may mean some one else's product; I would not say about that; there is no reason why it should mean any other than the goods manufactured by the Birmingham people. I do not agree with the witnesses who have testified that in this case Koke means any kind of Cola beverage. I do not go around soda-fountains much. I know what Koke means for the same reason that you know what

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Coca-Cola means. It has been on the market 26 years, advertised ever since the day we commenced, Koke went out at practically the same time Coca-Cola went out to the public; the traveling men out of Atlanta knew of Koke in 1888, and very little of Coca-Cola prior to that time, and they are great advertisers, and I figure that the traveling public has helped us as largely in popularizing Koke, as well as Coca-Cola. I have heard the expression Koke used at soda-fountains in Atlanta, and drank it myself. The people I sold it to, one is Tyner and a good many around there. Koke was like Coca-Cola; it did not have very many customers in 1888. I have not been over North or South Carolina; my boys have traveled over there, but I have reason to believe Koke means Koke there. Koke is used at the soda-fountains in Alabama, Georgia and the Carolinas. I presume this term Koke is used most in the States where I have pushed it most, Mississippi, Florida, Texas, Louisiana, Oklahoma, Arkansas and some in Missouri, are the States where it has been pushed most; the term Dope is used most in Birmingham, I presume. That territory has spread out some in Georgia. I do not know about North Carolina. I would not say to a greater part of Tennessee, than Koke. We received most of our orders for Koke from the States I have just mentioned, and most of the Dope orders from the Birmingham territory, Alabama and adjoining States. There may be an instance once in a while when a fellow means the other fellow's product. I

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would not say. I think Koke means my goods, maybe somebody else's, I can't read the other fellow's mind. I presume the word Dope is applied to Coca-Cola often; I presume it is applied to my Celery Cola and Koke even. I suppose Koke is applied to Coca-Cola; I would not say for sure. I have [1264] got Koke and Dope pretty extensively advertised in the States mentioned, I figure, in soda-fountains and bottlers and grocery stores. Some in North Carolina, I advertise Koke and Dope, advertisements such as I mentioned yesterday go to those places. I think that the name Koke as used around soda-fountains originated from my advertising; I think those hangers originated that. Exhibit #71 has not got the manufacturer's name on it; this was a 1914 calendar; must have been gotten out in 1913. I could not say how many of those I ordered; I mean this particular pattern. I presume I would have from one to three hundred for a bottler; this has a bottlers name on it; this same pattern might have gone to other bottlers. I have two or three Bloodwines bottling Koke. We have a Bloodwine Bottling Company at Tampa, Florida; they bottle Koke. Exhibit #73 was gotten out on the local market here, for New Orleans. Mr. Scott got a lot of these out before his death. I was not here. He got out a good many of them. Exhibit #74, I believe, I got this from a man in Illinois that I spoke about, Goust. We got a great many; I could not say how many. This was one of many patterns that we got, if I only got this pattern for one bottler he gave me from one to three

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hundred, but if I got it for another bottler I got more. He had some with our advertisement, and some with no bottler's name on them that I gave to the other trade. #75 I will make you the same answer. I would not say the same people got that out, but I believe that is the firm from whom I bought. The amount spent in advertising Koke in 1914, I can only answer for this business. This class of advertising, including tickets, I would say this office outside of—I mean including that class of advertising around three thousand dollars, that in tickets runs pretty high, I would say four or five hundred dollars, I include the cost of redemption. During 1914 the Dallas office advertised to the consuming public, the Chattanooga got out considerable advertising. I do not think the Central Koke did as much as we did. These leather aprons with Koke and Dope on them were gotten out last year. I do not know what time; I think maybe in the spring. I never had any aprons of the kind before. The last aprons I had I think were cloth. **[1265]** I remember having a brown apron prior to this, and it seems to me we bought it of those people in Coshocton. These brown aprons I had just before I left Birmingham is another class of advertising I had forgotten. I had Koke on those that was about 1906 or '7. The name of that concern, it seems to me, was Meek & Beach Company; there were two or three other advertising concerns I bought from, but that is the only one I recall just now. That apron that I had in 1907 had about what they have here, I presume. It did not have Dope,

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because I did not own Dope, but Koke. It did not have the name of the manufacturing concern at all, this number 124, I got out after buying the Dope trademark. I could not say when I did have that particular card printed; it is not a new card; we have had it quite a while; that card has been printed away back yonder. To the best of my recollection the De Luxe Press printed it, here in the city. The De Luxe Press printed that just after I bought out Houppert & Worcester, after I got the papers and everything. I purchased this advertising that I exhibited here on yesterday from the N. O. Cholston of Illinois, I believe that is the initials, Mr. Goldsmith, A. Goldsmith, I believe, I bought from him, and he had his folks ship some, and also Mr. Juhls, and he had his folks ship it. I also bought some from another local agent here. I am trying to think of them; one of them represented Walsted; in fact I tried to buy some from every man that came along. He might not have been representing this particular house I bought from and there is another house I bought from, I do not recall it. I cannot remember anyone else. Our advertising in 1913 did not amount to so much, I do not suppose, as in 1914. I do not know their books are not here; it may have been more, I could not say. I was in Jersey City such a short time; the name was either J. C. Mayfield Manufacturing Company or Pemberton Medicine Company. I did not do much while I was there; I was only there three or two months. After I left Birmingham I went from there back to Texas. I was in sorter bad

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health in Dallas, and I did not do much there for quite a while. I stayed there, but, of course, I was back in Birmingham two or three times. My sons were carrying on the business at that time, one was in Houston [**1266**] and one was at Birmingham. I myself was not active, right along then, I was resting up. I remember now making one or two trips to Houston, in connection with our business; my son was down there, and he *had* up quite a good big trade in his office and I went there and stayed there a good while, was working with my son, there was a fellow named Whitmire, the same Whitmire that was mentioned at Shreveport. A little later my third son Carl went down there, too, and stayed quite a while. I left that part of it, my books, accounts, and a mail order business that would come in, to my oldest son, who stayed there, and I gave the bottling business to my son in law, the Birmingham Celery Cola Bottling Works. They bottled Celery Cola; they did not bottle Koke. We thought that we would get along better to bottle Koke and have two bottlers in the same town. I did not get that there. My business went on still, manufacturing and extract business. Steve Mayfield who was in charge manufactured the syrups. Steve was handling that end of it looking after what mail orders would come in and for three or four years, we had several thousand dollars on our books. He was in that business up until around 1911, he went out of that business about the time and is now in his present business. My other sons were manufacturing down in Houston. We had a Celery

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Cola business in Dallas at that time, and had a Koke business in Houston. We had some bottler down there, I do not just remember where he was located, but he had his business at some bottling works. That bottler bottled our goods, he bottled Koke. That was J. W. Mayfield. I am a little ahead of my son going to Houston. He went to Denver and came from Denver; I think it was in 1910, he came back from Denver. The Houston office was opened prior to his coming. J. W. was in charge out there. J. W. stayed there and came here from Houston, I believe. I was in and out of Dallas, it must have been 1808, '9 or '10; 1910 I was in the Koke business, in Dallas, Ft. Worth, and Shreveport. The Celery Cola business was in Dallas up to 1910. The Koke business was not started in Dallas in 1910. We did a little manufacturing there for a short time, two or three weeks, but I did not want to get the mail, whereas there would be any confusion [1267] and I went to Ft. Worth and opened an office there. I do not really believe there was a name of the concern in Houston. My son was making that headquarters; he may have had some stationery, I do not remember about that. He sold and delivered, the stuff was being shipped from St. Louis. Mr. Van Dusen had taken charge of it; that was being shipped from St. Louis to Dallas and Houston. In 1910 I was over in Ft. Worth and I had this man Whitmire out at Shreveport. There was no one at Dallas when I left there. The old Celery Cola Company were winding up their business; I supplied Dallas from Ft. Worth in 1910 and '11.

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The Dallas concern was known as the Celery Cola Company. At Houston my son was selling, they had some advertising for the fountains and bottlers and sowing seed; I let the boys go ahead and create a demand, build up a trade and then try to organize a company. I do not remember the name of the bottler at Houston that was bottling Koke; I was not there very long, maybe a day or two at a time. I was in and out of these Texas towns. I think my son went there in 1904 or '5 and first opened up in a small way. He opened the Celery Cola company up in Dallas, that was J. W., and later on he lost his health and he threw up the business. Steve was not there. I do not know just when I would go to see the boys, and see how they were getting along. Besides myself and the boys and Mr. Whitmire there was a fellow named George R. Clarke, and a man named J. I. Daley; I think Mr. Clarke is living now in Ft. Worth. I would not say what business they are connected with now. Daly manufactured for me here, manufactured for us all around. It is my intention and his, too, to do some manufacturing out there in that line, this is one reason he is sorter waiting on that. I was over at Shreveport two or three times, in 1910 and '11. In 1911 I contracted to George R. Clarke all of the State of Texas. And the established trade that they had in Houston I thought I had that territory so it would be taken care of and I went to Little Rock; I arrived at Little Rock about the summer of 1911. In Little Rock I rented me a place and ordered me some Koke extract from St. Louis, and

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had my youngest son come there and go on the road to get business [1268] and sell Koke. I stayed in Little Rock only a few months; there is a fellow by the name of Parvin up there on the road you go to St. Louis; I cannot recall the name that I sold goods to. At Little Rock, J. I. Daly helped me mix, and, as I say Mr. Parvin took hold shortly afterwards there. That was the latter part of 1911 and I went back to Ft. Worth. Mr. Clarke had a deal pending with the Dallas people. McCarty Moore, they wanted me to close up, so as to close up and get things fixed satisfactorily and I stayed there then until sometime in the next year 1912. Then I went back to Little Rock, I stayed in Little Rock then for four or five or six months. I manufactured Koke back there, nothing but Koke. Koke was the only product I made in Little Rock. That was the latter part of 1912 they called me to Dallas; they had a deal pending with the New Orleans people, and they called me over there. I went over there and stayed about a week, and we agreed on everything; Mr. Moore then came to New Orleans and I went back to Little Rock. I stayed at Little Rock until some time in 1912. I was not manufacturing the flavor Koke at that time. I had contracted the State along about then, to the Dallas Company. The Dallas office took charge, and I turned over everything. My wife was in bad health and in the sanitarium to be treated and I had to stay there. Later on in the summer of 1912, after my wife came out of the sanitarium, I went back to Dallas and stayed there a little while and then we

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went on to Mineral Wells, in Texas. I was not manufacturing then at all; Van Dusen was doing the manufacturing. Van Dusen manufactures a great many different things; he runs a pharmaceutical laboratory; he makes the extract. I had been using prior to my contract with him, fluid extract of coca leaves. He started after the pure food law went into effect. I was there in an endeavor to make my goods comply with the law, and stayed there quite a while, until we got it down like we have it now. Then he commenced making the extract Koke; he also made the Celery Cola. I might add there, that I made some myself in the meantime, but he has made the bulk of it. I will say this, however, for me he may have made these goods in syrup form, for my boys have been in and out of there, that is, making it for them, which is practically for me. **[1269]**

Redirect Examination.

Mr. Van Dusen makes Koke extract for the Koke Company of America, at a fixed price, based on caffeine. If caffeine goes up or down it fluctuates the price a little bit, he buys all the materials that enter into the compound, that is by my instructions. He makes it by the original Coca-Cola formula as I stated to-day with the changes I made, and the changes were those I have already explained. There is a verbal or there was a contract at the beginning but that has expired long ago and he has continued right along, there was provided in the contract with reference to Mr. Van Dusen making Koke for anybody else but the Koke Company of America. No

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he has not made it for anybody but for us, but for me. He made it for me before he made it for the Koke Company of America.

Deposition of L. E. Whitmire, for Defendants.

L. E. WHITMIRE, a witness produced on behalf of defendants.

Direct Examination.

I am twenty-five years of age; my people live in Little Rock, Arkansas. I am now engaged in the soda-fountain business. I was connected with the Koke Company of Shreveport, Louisiana. That was the first of 1910. When I first became connected with them, I was shipping clerk, and handled the City trade. They had bottlers at Shreveport at that time. They labeled the bottles, the Koke they put out at that time. Defendants' Exhibit #121, that is the label we used in Shreveport. Defendants' Exhibit #121, that is the label we used in Shreveport. Defendants' Exhibit #164, this is a ticket that we used at our fountain to give our customers to use, at their fountains, a redeemable ticket, advertising our Koke Drink. I was in Shreveport possibly about three or four months, after that I went to Winfield, Louisiana. After I left Shreveport I was handling an agency for Koke. I went on the road with Mr. R. L. Flether and I sold the parties at Winfield, and I then went on the road for Mr. Winfield after I contracted with him, sold him the Koke business for Louisiana. He was a bottler. In selling Koke I traveled Louisiana, jumped into a

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portion of Arkansas and Texas and also later I went into Old Mexico. In Mexico I went from Juarez to the city of Chihuahua. I sold Koke in Mexico. I only sold two, a Mr. Sutor, an American and the other was a Mexican I cannot remember the name. It might have been [1270] General Villa, but I doubt it. I stayed there, I handled the fountain in Mexico for about eleven months, in the City of Chihuahua and also I handled Koke on the side. I went to El Paso. I had a little office there of my own and I sold Koke there for quite a while, about a month I believe, it was something like that, about a month and a half. I made my headquarters El Paso. I was working the city only. I worked as soda dispenser at Richmond, Texas, and Sugarland, Texas. At Richmond, Texas, I worked for Mr. H. N. Dorris. When I went there they were selling Koke and I believe a drink called One-Better, of Houston—and Coca-Cola, Koke, and One-Better. I dispensed Koke and Coca-Cola. That was in 1912. I was in the Koke business from the first of 1910 to about the first of 1912, about two years. These other places I went to, these soda-fountains where I worked, I dispensed these complimentary tickets. I distributed some of those tickets in both Richmond and Sugarland. I put up advertisements at the soda-fountains. I had streamers, that is cardboards put up on the mirror and over my cash register.

Cross-examination.

These labels (Exhibit #181) was in Shreveport, Louisiana, I forget just exactly who made them, I

(Deposition of L. E. Whitmire.)

believe the Castle Printing Company. They printed them, I do not know who made the cut. I could not say whether they were made in Shreveport or not. I do not know where the cuts came from. I did not have anything to do with the printing of the labels. Mr. Mayfield did that. The drink One-Better is a drink a party was making in Houston, a cola drink. My position with this Koke Company at Shreveport was shipping clerk, handled the city trade, that is around town, the city, Mr. Mayfield was the head of the office, he was the owner of the Koke Company. He got our compounds from St. Louis, from Mr. Van Dusen. I am now in the soda-fountain business. Up to the first of this year I was in the fountain business at Sugarland, Texas, the Imperial Mercantile Company, at Sugarland, Texas, behind the fountain as dispenser. They were handling Koke there when I left there. At the present time I am with nobody, I have not worked since the first of the year. This place I worked was the Imperial Mercantile Company at Sugarland, Texas. [1271] And they handled both Koke and Coca-Cola. I worked there from August 1, 1912, until the first of 1915.

Deposition of T. D. Culbreath, for Defendants.

T. D. CULBREATH, a witness produced on behalf of the defendants.

Direct Examination.

I am forty-three years of age. I live at 3817 Bowser Street, Dallas, Texas. I am in the wholesale drug business. The name of the firm is The

(Deposition of T. D. Culbreath.)

Texas Drug Company. I have been connected with that company for four years. We job Coca-Cola and some Koke. I think we handled the Koke in 1912 or '13. I do not know the style of the firm who made the Koke, the Koke Company of Texas, a Mr. Boyd represented them. We were handling Coca-Cola also at the same time. Our sales of Coca-Cola amounted to between forty and sixty thousand dollars per year at that time. And about ten or twelve barrels of Koke. After we began to handle Koke the Coca-Cola Company shut us off from selling Coca-Cola. I talked with Mr. Candler of the Coca-Cola Company, Mr. Candler sitting here, Mr. Dan Candler, he did not say very much of anything about us handling Koke. He cut us off and I asked him what he wanted to cut us off for and he said because we were rebating, in other words, we were cutting the price on it and all the conversation I had with Mr. Candler about Coca-Cola as I remember now was that he said also, Mr. Culbreath you are not treating me exactly right, you also handle Koke. He said, your man Scott has sold some, is working in East Texas. He said he had a brother-in-law that works for the Koke Company and it is natural for him to promote his interests. Well, I took that up with Mr. Scott and I looked up our record and I found out that Mr. Candler was mistaken, all the business that Mr. Scott had taken was some that the Koke Company of Texas had given him, only two barrels and they came out of his territory. I think this is about the extent of the conversation Mr. Candler

(Deposition of T. D. Culbreath.)

and I had. We may have had more but I do not remember it. The Texas Drug Company were rebating when I went there, with them, I went with them in 1911. I do not know how long they had been rebating before that, for years I reckon. Our traveling men said other jobbers were rebating their customers on Coca-Cola sales and we met competition and rebated. We did that because others were rebated [1272] too. After the sales of Coca-Cola to us by the Coca-Cola Company were cut off, we quit handling Koke too. After we quit handling Koke we began handling Coca-Cola again. Mr. Candler came back from Atlanta I think it was the first of October, they cut us off about the fifteenth of June I think, that is my memory, I do not remember exactly.

Cross-examination.

Mr. Candler did not have any particular objections to Koke except that it was being sold at the fountains as a competitor, is all that I know. He regarded it as a substitute or an infringement. That word Koke was a substitute, a familiar nickname for Coca-Cola and on the ground that he objected.

Q. And it is a matter of common knowledge, isn't it in this section of the country that it is a common nickname for Coca-Cola?

Mr. LITTLETON.—We object to that form of the question because it is leading and because it is wholly outside of the direct examination, and in asking that question the counsel makes the witness his own witness and we object to it as leading.

(Deposition of T. D. Culbreath.)

Objection overruled and appeal prayed and granted.

A. Yes, sir. [1273]

Deposition of J. G. Van Winkle, for Defendants.

J. G. VAN WINKLE.

Direct Examination.

Twenty-seven years of age; live in Dallas, Texas; lived here about 12 years; engaged in manufacturing business. At the present time I am not engaged in anything but the jobbing business. I was connected with the Koke Company of Texas as Secretary of the Company. The Koke Company of Texas was selling Koke. I became connected with that company January 1, 1912. The Koke Company of Texas advertised their product that they were selling, Koke. (Paper marked Defendants' Exhibit No. 122.) They are three ledger sheets out of our ledger of the Koke Company of Texas. They show sums expended for advertising which we purchased. The first item on sheet #1, February 8, 1912, match safes, E. M. & Co., $42.50 is for some little novelties.

Mr. ROGERS.—These sheets are objected to as not properly proven.

Objection overruled.

Match safes.

Mr. ROGERS.—What were those match safes advertising?

A. Koke.

Q. Do you remember what they had on them?

(Deposition of J. G. Van Winkle.)

Mr. ROGERS.—I object to that as secondary evidence.

Objection overruled.

"The compliments of the Koke Company of Texas, Dallas, Texas," as I remember and on the reverse side it had "Koke, the ideal drink." I have none of them, we gave them away to friends, soda jerkers, druggists, anyone that happened to ask for them. All on that is for advertising the money which was expended to buy advertising with, the articles mentioned therein were purchased by the Koke Company of Texas, they were used in advertising this product. There is an item on there showing where we advertised in the "Dallas News," a newspaper in Dallas, Texas. That is on sheet #3, Feb. 5, 1913. That was the date the bill was paid. The kind of advertisement was a New Year's card. The ledger sheet shows tickets, quite a number of places for instance, Angus Young tickets $3.35; Dallas, tickets $5.80; Texas Drug Company, tickets $2.70 and a whole line of names of that sort, were free coupons [1274] entitling the holder of it to a drink at a soda-fountain where our product was served and the tickets were turned in by the different dispensers and we in turn cashed them under the contract embodied in that ticket. (Ticket marked Defendants' Exhibit #183.) That is one of the tickets referred to. On this statement from the Skeg Printing Company (marked Defendants' Exhibit #184) at the fourth item on that statement is for ten thousand cards, $47.50, that was the bill for the cards, Exhibit

(Deposition of J. G. Van Winkle.)

#183. The invoice for those tickets we distributed throughout Dallas and surrounding territory, practically 10,000 of these tickets. How many we redeemed I am not in a position to say. The larger percentage of them I should say.

Mr. ROGERS.—I object to that and move to strike the answer out, it is obviously the conclusion of the witness as he has no actual knowledge of the subject.

Objection overruled.

I attended to the fountains and drug-stores in redeeming these tickets. (Paper marked Defendants' Exhibit #185.) That is an advertisement of the Coca-Cola Company which I clipped from the "Dallas Times-Herald" of issue September 10, 1913. (Paper marked Defendants' Exhibit #186.) That is an advertisement of the Coca-Cola Company which I clipped from the "Dallas Morning News" of issue September 4, 1912. (Defendants' Exhibit #187.) That is an advertisement of the Coca-Cola Company clipped from the "Dallas Morning News." I clipped that dated August 30, 1912. (Defendants' Exhibit No. 188.) That is April 24th, 1912 edition of the "Weekly Pitchfork." On the back page of that paper is a Coca-Cola advertisement. (Defendants' Exhibit #189.) I judge that is a bottle of lemon sour. It is put up in a bottle with the name Coca-Cola blown in the glass, bottled by the Coca-Cola Bottling Works, Dallas, Texas. I purchased it on May 3, 1914 from the wagon of the Coca-Cola Bottling Works, Dallas, Texas. I identify that as the bottle I purchased because it has the original

(Deposition of J. G. Van Winkle.)

label which I pasted on the bottle at the time I purchased it. (Defendants' Exhibit #190.) That is a bottle of [1275] lemon sour soda water contained in a bottle with the name Coca-Cola blown in the glass. That was bottled by the Coca-Cola Bottling Works, Dallas, Texas. I purchased it on May 3, 1914, from a wagon of the Coca-Cola Bottling Works. (Defendants' Exhibit #191.) That is a bottle of lemon-sour soda water contained in a bottle with the name Coca-Cola blown in the glass, bottled by the Coca-Cola Bottling Works of Dallas, Texas. I purchased that on May 3, 1914, from a wagon of the Coca-Cola Bottling Works. Defendants' Exhibit #192 is a bottle of "brew," a bottle with the name Coca-Cola blown in the glass, bottled by the Coca-Cola Bottling Works, of Dallas, Texas. I purchased it from a Coca-Cola Bottling Works wagon on May 3, 1914. Defendants' Exhibit #193 is a bottle of strawberry soda water contained in a bottle with the name Coca-Cola blown in the glass. I purchased it from a wagon of the Coca-Cola Bottling Works on May 3, 1914. Defendants' Exhibit #194 is a bottle of lemon-sour soda water contained in a bottle with Coca-Cola blown in the glass purchased from a wagon of the Coca-Cola Bottling Works May 3, 1914. Defendants' Exhibit #195 is a bottle of "Brew" contained in a bottle with the name Coca-Cola blown in the glass I purchased from Heeder's Stand, 316 South Hallwood Street, May 9, 1914. I asked the dealer from whom I purchased it, where he got it.

(Deposition of J. G. Van Winkle.)

Q. Where did he get it?

Mr. ROGERS.—Objected to as hearsay.

Objection overruled.

From the Coca-Cola Bottling Works. Defendants' Exhibit #196 is a bottle of "brew" I purchased from the stand of Heeder's, 316 South Hallwood Street, May 9, 1914, and it is contained in a bottle with the name Coca-Cola blown in the glass. I asked him where he got that bottle, and he said he bought it from the Coca-Cola Bottling Works.

General CRANE.—That is objected to as hearsay.

Objection overruled.

Defendants' Exhibit #197 is a bottle of sweet-lemon soda water contained in a bottle with the name Coca-Cola blown in the glass. I bought it from Mr. Heeder's stand, 316 South Hallwood Street, Dallas, Texas, [1276] May 9, 1914.

Q. Did Mr. Heeder say where he got that bottle?

A. From a wagon of the Coca-Cola Bottling Works.

General CRANE.—That is objected to as hearsay.

Objection overruled.

Defendants' Exhibit #198 is a bottle of lemon soda water contained in a bottle with the name Coca-Cola blown in the glass. I purchased this May 6, 1914, from Marquet's stand.

Q. Did you ask Mr. Marquet where he got that bottle?

Mr. ROGERS.—That is objected to as hearsay.

Objection overruled.

I did. He said he got it from The Coca-Cola Bot-

(Deposition of J. G. Van Winkle.)

tling Work's Wagon. Defendants' Exhibit #199 is a bottle of lemon-sour soda water contained in a bottle with the name Coca-Cola blown in the glass. I purchased this from a wagon of the Coca-Cola Bottling Works on May 3, 1914. Defendants' Exhibit #200 is a bottle of strawberry soda water purchased May 9, 1914, from Heeder's Stand, 316 South Hallwood Street, contained in a bottle with the name Coca-Cola blown in the glass. Defendants' Exhibit #201 is a bottle of lemon-sour soda water contained in a bottle with the name Coca-Cola blown in the glass. It was purchased by me on May 3, 1914, from a wagon of the Coca-Cola Bottling Works. Defendants' Exhibit #202 is a bottle of lemon-sour soda water contained in a bottle with the words Coca-Cola blown in the glass; I purchased it from Heeder's stand at 316 South Hallwood Street, May 6, 1914. Defendants' Exhibit #203 is a bottle of strawberry soda water purchased at Mr. Marquet's stand, May 6, 1914, contained in a bottle with the words Coca-Cola blown in the glass. Defendants' Exhibit #204 is a bottle of strawberry soda water with the words Coca-Cola blown in the glass; I bought it from Heeder's Stand, 316 South Hallwood Street, Dallas, Texas, May 9, 1914. Defendant's Exhibit #205 is a bottle of strawberry soda water with the words Coca-Cola blown in the glass which I purchased from Heeder's Stand, 316 South Hallwood [1277] Street, Dallas, Texas, May 6, 1914. Defendants' Exhibit #206 is a bottle of lemon-sour soda water contained in a bottle with the words Coca-Cola blown

(Deposition of J. G. Van Winkle.)

in the glass, bought from Heeder's Stand, 316 South Hallwood Street, Dallas, Texas, May 9, 1914. Defendant's Exhibit #207 is a bottle of strawberry soda water contained in a bottle with the words Coca-Cola blown in the glass which I bought from Heeder's Stand, 316 South Hallwood Street, Dallas, Texas, May 6, 1914. Defendants' Exhibit marked #208 is a bottle of sweet-lemon soda water contained in a bottle with the words Coca-Cola blown in the glass. I purchased it from Heeder's Stand, 316 South Hallwood Street, Dallas, Texas, May 9, 1914.

Q. Now, state whether or not the bottles which you purchased from the dealers if you asked them where they got the bottles in each instance.

A. I did.

General CRANE.—That is objected to as hearsay.

Q. What was their reply?

A. The Coca-Cola Bottling Works' wagon.

General CRANE.—You will please note the same objection.

Objection overruled.

I identify the bottles by the labels attached to them; I put the labels on them when I purchased them. (Defendants' Exhibit #209.) That is a bottle of Coca-Cola that came from the Austin Bottling Works, Austin, Texas. Defendants' Exhibit #210 is a bottle of Coca-Cola that came from *August* Bottling Works, Austin, Texas. Defendants' Exhibit #211 is a bottle of Coca-Cola bottled by the Jacksonville Bottling Works, Jacksonville, Texas. Defendants' Exhibit #212 is a bottle of Coca-Cola

(Deposition of J. G. Van Winkle.)

bottled by Jacksonville Bottling Works, Jacksonville, Texas. Defendants' Exhibit #213 is a bottle of Coca-Cola bottled by the Coca-Cola Bottling Works, Rockwood, Tennessee.

The Koke Company of Texas is not now selling Koke, they quit; they could not sell the goods on account of suits, from the Coca-Cola Company and its representatives.

Mr. CRANE.—We object to that as hearsay. [1278]

Our customers wrote us letters advising us of that fact. Defendants' Exhibit #214 is a letter dated Fort Smith, Arkansas, October 24, 1914, addressed to the Koke Company of Texas, Dallas, Texas, signed by John Schappee Drug Company. I received that letter in the due course of mail. Our customers declined to handle Koke on account of threats from the Coca-Cola Company and representatives of the Coca-Cola Company. That fact was made known to us through the mail direct from these different parties and through our agents. Jobbers who had been there before jobbing Koke refused to sell it any longer, stating that they had been threatened by the Coca-Cola Company.

Mr. ROGERS.—That is objected to as hearsay.

Objection overruled.

That if they did not refuse to stop handling our product they would be cut off from the supply of Coca-Cola.

Mr. ROGERS.—I move to strike the answer out as hearsay.

(Deposition of J. G. Van Winkle.)

Motion overruled.

The Koke Company of Texas surrendered their license from the Koke Company of America to sell Koke, surrendered it to J. C. Mayfield, President of the Koke Company of America. That was done January 1, 1915.

Cross-examination.

The Koke Company of Texas has not gone out of business; we are not shipping Koke. The last shipment was prior to January 1, 1915. We have shipped none since January 1, 1915. I could not say the exact date the last shipment was sent without looking up the record. I judge right at the 31st of December, though. We have had complaints from our customers, or the customers of the Koke Company of Texas that agents and representatives of the Coca-Cola Company had "bull-dozed" them. I have received letters stating that fact. I am not prepared to state the exact number; quite a good many of them. I turned them all over to Mr. Mayfield, J. C. Mayfield, as I received them; I do not know the first date; maybe from October or November, 1914. I judge letters have been received since the date of the one offered in evidence. [1279] Everything received up to that time has been turned over to Mr. Mayfield but this one letter here. I turned this over to him also. I should judge this is the only one that has been produced, that is the first time I have seen it since I referred it to Mr. Mayfield last Fall. Mr. Littleton just then handed it to me.

(Deposition of J. G. Van Winkle.)

Mr. ROGERS.—Have you the rest of those letters, Mr. Littleton, all of them or any of them?

Mr. LITTLETON.—I am not on the stand.

Mr. ROGERS.—I know, but I am asking you if you have any of them.

Mr. LITTLETON.—I am not on the stand; you cannot ask me.

Mr. ROGERS.—I wish the records to show that counsel requests Mr. A. B. Littleton to produce the letters referred to by the witness; you decline to produce them.

Mr. LITTLETON.—I do not say whether I have got them or not; I am not on the stand.

Mr. ROGERS.—Will you produce them?

Mr. LITTLETON.—I will produce the letters when the time comes.

Mr. ROGERS.—We want them now.

Mr. LITTLETON.—I am not on the stand and do not want to introduce them. I do not want any of your detectives to find out the witnesses I have got, and get to them before they get on the witness-stand.

Mr. ROGERS.—I trust the records show that too, Mr. Commissioner.

The COMMISSIONER.—Yes, sir.

I began to manufacture Koke January 1, 1912. I had previously been in the employ of the Coca-Cola Company in the manufacturing department, but not altogether. I was somewhat familiar with the constituent elements of Coca-Cola. I did not know all of them. I knew its general make up, however.

(Deposition of J. G. Van Winkle.)

Mr. LITTLETON.—We object to that line of cross-examination because it is not based on anything in the witness' direct examination and because it is leading and he makes the witness on that point his witness, and is leading his own witness. [1280]

General CRANE.—In Texas the rule is the other way.

Objection overruled, and appeal prayed and granted.

I was Mr. Candler's stenographer for a part of the time and wrote his letters.

Q. You knew that the Coca-Cola Company was having difficulties with substituting, did you not?

Mr. LITTLETON.—I object to that same line of cross-examination for the same reason as heretofore stated.

Objection overruled and appeal prayed and granted.

The WITNESS.—Shall I answer the question?

Mr. LITTLETON.—Go ahead and answer the question.

A. I did.

Q. You know that the Coca-Cola Company regarded the name Koke as a nickname for Coca-Cola?

Mr. LITTLETON.—We object to that for the same reason as heretofore stated.

No, I never heard that discussed.

Q. Well, if you did not hear it discussed you knew that the Coca-Cola Company regarded the name Koke as an abbreviation for Coca-Cola?

(Deposition of J. G. Van Winkle.)

Mr. LITTLETON.—We object on the same ground, that he is making the witness his own witness on matters not touched upon in the direct examination.

Objection overruled and appeal prayed and granted.

A. Why the Coca-Cola Company was selling Coca-Cola they were not selling Koke.

Q. What was your object in putting in this advertisement from the "Dallas Times" of September 10, 1914.

Mr. LITTLETON.—We object to that question. The witness did not put it in. It was put in by counsel and the witness has no object one way or the other.

Objection overruled and appeal prayed and granted.

I cut it out because I deemed it was unfair advertising, it was knocking us, the Koke Company, in this particular advertisement which has been offered in evidence as #185, that was in support of the arguments of their traveling men. It struck me as a knock in that direction the minute I saw the advertisement. The product of the Koke Company of [1281] Texas in this section has always been sold under the name of Koke, never under the label Dope. I have a few specimens of advertisements that are referred to in these sheets called ledger pages. I have not brought them in, I do not know where they are, I have not any to produce. February 8, 1912, is not the date when our advertising began, that is when

(Deposition of J. G. Van Winkle.)

we paid for the item, we bought it in January, and paid for it in February, and these bills, these items, here represent the dates of payment. This advertising is all advertising of Koke, and none of Dope. Some of the other Koke companies use it, that is my understanding. All of these bottles that I have recognized here as Coca-Cola Company's bottles, except the Coca-Cola—except the "brew" is an entirely different color from Coca-Cola. The "brew" is stamped on its crown "brew." The Koke Company of Texas never had a barrel sent back because it was supposed to be sour, I am sure of that, there was no Koke sent back from Fort Worth on the ground that it had soured at any time. I think I know what barrel you have reference to coming back from Fort Worth, it was not the quality of the syrup, it was the container. It was a root beer barrel we had bought in the open market previously containing root beer, painted and sold by us in the factory and the man filled it with our syrup, painted, labeled it and shipped it out. Of course a root beer barrel is a clear barrel and the wood had absorbed some of the acid. When our syrup was put into it it took up that acid and flavored it, of course. We usually use Koke barrels. We try to buy second hand barrels, any kind that suit the requirements. We would buy Coca-Cola barrels and do. I think about 25 per cent were Coca-Cola barrels. The rest of them were general barrels, new barrels, 25 per cent were new barrels. We would use some whiskey, not charred though, we would use coined whiskey barrels, clear

(Deposition of J. G. Van Winkle.)

barrels. We bought a good deal of our stock from the Dallas Cooperage Company and other manufacturers. We cleaned them up and painted them red and sent them out.

Mr. LITTLETON.—I want to tender and offer in evidence as [1282] Defendants' Exhibit #181 to 213, I think that is all, as evidence on behalf of the defendants in the above-entitled causes. We did not put a label on the barrels when they are shipped out, none other than our shipping tag, that is a little square tag that is packed on, it is about 2 by 5 inches made out of cardboard. It has a blank for the address and from the Koke Company of Texas, Dallas, Texas, and generally in one corner we put the gauge and contents. Gauge of the barrel is quantity, contents of the barrel, quantity of syrup. This had been our method of marking the barrels from the beginning up until the time it stopped on January 1, 1915.

Redirect Examination.

I remember a call on us by an advertising agent of the "Dallas News," I think his name was McClean. In the course of that conversation I did not tell Mr. McClean that the Koke Company of Texas was not doing any advertising. There were others in the office when that gentleman called. The young lady stenographer was there. The Koke Company of Texas never painted the barrels a different color during the time they were in existence; they painted them the same shade all the time.

Deposition of J. G. Davis, for Defendants.

J. G. DAVIS.

Direct Examination.

I am 49 years old; live in Dallas, Texas. I am engaged in the wholesale drug business. The name of my concern is the Greiner-Kelley Drug Co. I am Secretary and Treasurer. Our concern dispenses and sells by the wholesale syrup for making cola beverages. We handle Dr. Pepper, Coca-Cola, Jersey Creme. I think that is about all; maybe some others. We did handle Koke made by the Koke Company of Texas, I cannot remember just the date, it has been, I presume about 3 years ago. We were handling Coca-Cola at that time also. We are not handling Koke now, we quit handling Koke because the Coca-Cola Company declined to sell us if we handled Koke. I have had conversations with persons connected with the Coca-Cola Company, I had a conversation with Mr. Candler, D. B. Candler, sitting here with counsel for complainant. As near as I can recall it, Mr. Candler called me over the phone and asked me if [1283] we were handling Koke and I told him that we were accepting orders for Koke from our customers, that we were not carrying it in stock, and he said then, if that was a fact he could not sell us Coca-Cola, and I asked him to come over and talk to me about it and he said there was not anything to talk about and the conversation—well, I also asked him if our account was satisfactory otherwise and he said that it was but that he

(Deposition of J. G. Davis.)

would not sell anybody that sold Koke, and I hung up the phone then, and about the next day or the day after we phoned him an order for I think 10 gallons of Coca-Cola and he declined to fill the order and I went to the phone and called him up again and he said, "I told you the other day that we could not sell you Coca-Cola if you handled Koke." Then it was a question of business policy with us, as we could not handle both accounts we took the one that we considered the most profitable to us, and I went over and saw Mr. Candler. I had a personal conversation with him and I told him that I would not handle Koke any more and he then began to sell us Coca-Cola and has sold us ever since we have not handled Koke. I called up Mr. McCarty Moore, I believe is the gentleman's name, who represented himself as the head of the Koke Company and told him the circumstances and that we could not handle Koke. I had a few unfilled orders, orders that were to be shipped out at later dates, that had not been executed and I returned those to him. I have always recognized Mr. Candler as manager of the Dallas branch of the Coca-Cola Company. I do not know whether that is correct or not.

Cross-examination.

Mr. Candler advised me during those interviews that Koke was an abbreviation of Coca-Cola, something of the kind that the Koke Company was taking advantage of that for the purpose of imposing on its customers. I do not know what it was. Mr. Cand-

(Deposition of J. G. Davis.)

ler did not object to my selling Dr. Pepper's drink, nor any other soft drink; he objected to Koke for the reason that he thought it infringed on his trademark, that it was being substituted for his goods, that was the idea I got. **[1284]**

Redirect Examination.

I could not tell just the conversation, just the words that he used, it has been so long, but as I told General Crane there, I had the idea that his objection was that they were unfair or infringing or an infringement on the Coca-Cola Company, something of that kind, but I cannot tell just the words he used.

Recross-examination.

I am not prepared to say it was a reasonable suggestion to me.

Deposition of Dr. J. G. Pyle, for Defendants.

Dr. J. G. PYLE.

Direct Examination.

I am 57 years old; live in Dallas; have lived here since '93. I have been in the drug business the principal part of the time; I have been out of the business a time or two. I am engaged in the drug business now; the name of my concern is Rogers-Pyle Drug Company, that is Cecil V. Rogers, we have a corporation in which we control the stock. We did business in Dallas, Texas, under the name of the Palace Drug Company. At that time we had in our employ D. P. English, I think he worked for me once, he is a prescription man. I never saw him dispense any,

(Deposition of Dr. J. G. Pyle.)

if he did it was while I was out. He never did any of it. I always kept a couple of soda men and if he ever dispensed any, I did not know it. We dispensed Koke, the product of the Koke Company of Texas, a couple of years, I guess, 2 or 3 years, I do not remember the time. It was in 1912 and 1913, I do not know whether I handled any in 1914 or not, I think I did a little.

Q. 19. Did a representative of the Coca-Cola Company ever call on you?

A. Oh, yes; sure.

Q. 20. Who was that?

A. Why Mr. Boyd I think represented them.

Q. 21. The Coca-Cola Company?

A. The Coca-Cola Company, I thought you said the Koke Company.

Q. 22. Yes.

I think Mr. Harris used to come around occasionally; he came in there one day and talked about handling Koke. He said I was infringing [1285] on the Coca-Cola people. I said I did not see why. He said, well, you know when a man calls for their Koke he means Coca-Cola. I said I do not think so; if a man calls for Koke I give him Koke; if he calls for Coca-Cola I give him Coca-Cola; and he got kinder machy about it and made me sore and we had a few words and that was about all there was to it. He intimated that he was going to make me quit handling Koke or something like that. I do not remember [1286] just how he did put it now; it has been

(Deposition of Dr. J. G. Pyle.)

two or three years ago and I have hardly thought of it since. We had a few words there and I told him to get out of the house. I did not want a man to come around dictating to me what I was selling. I did not propose for him to do so what I would sell, that I carried both Coca-Cola and Koke and give a man what he called for. I did not propose that he should say that I should sell either one or should not sell either one. That is about all and about the way it wound up. He said something to the effect that he would not sell us Coca-Cola if we continued to sell Koke. I just inferred that he would not and for that reason I never ordered any more for awhile. I inferred that he would not sell me any from the way he talked, but I do not remember just what the words were now. I just knew him as Mr. Harris, representing the Coca-Cola people. I never met him except on such occasions when he called on me. He lives here in Dallas, I think. I gave the dispensers instructions with reference to the sale of Koke and Coca-Cola. I had several compartments to keep it in and I told them if they called for Coca-Cola to give Coca-Cola and if they called for Koke to give them Koke. I never told any of our dispensers to substitute Koke when Coca-Cola was asked for. I never told D. P. English to substitute Koke when Coca-Cola was asked for, because I never thought he had anything to do with the Coca-Cola business. I do not suppose he ever drew a drink unless he did it for himself, sometimes those fellows will draw

(Deposition of Dr. J. G. Pyle.)

their own drinks but I never did know him to sell a drink of any kind. He may have done it sometimes but it was not his business to do it. None of our dispensers, or D. P. English or anyone else connected with our establishment during the time we were handling Koke ever sold Koke when Coca-Cola was asked for to my knowledge. I never heard that they had done so. I always instructed them not to do it, if they did it they did it against my instructions. They may have carelessly done so some time but I never knew about it if they did. The Koke Company of Texas gave out tickets all over town for distribution, and they would bring them into me for drinks. None of our soda [1287] dispensers ever complained to me that the trade would not drink this product Koke and did not want it. There was about a week or two there I think, that I did not have any Coca-Cola, after Mr. Harris rounded me up so, I never ordered any more then for awhile and I think I got out for a week or two, I don't remember the exact length of time, I know I was out a little while, and during that time I told the boys to tell them that we did not have any, that we were out. So far as I know they followed my instructions but you cannot tell about a soda boy, they may do anything. It seems to me like it was 600 gallons of Coca-Cola I bought in 1913. I could not say that I know anything of my own personal knowledge about the Coca-Cola representatives going to soda dispensers dispensing Koke and getting them to knock it, but I have known of it. All I ever heard about it is hear-

(Deposition of Dr. J. G. Pyle.)

say. These tickets that were for Koke that were handed in at our soda-fountain by customers were later redeemed by the Koke Company. I have heard this word Koke applied to a soda-fountain beverage 8 or 10 years. The first time I ever heard the word Koke I was in West Texas, I think it was about 1904 at Albany, Texas, and I went and asked for Coca-Cola. They said we have not got Coca-Cola. I said, What have you got? He said, Koke. I said, What is Koke? He said, Well, it is something similar to Coca-Cola. I asked him to give me a Koke and he drew a Koke. That was the first time I remember of ever hearing it. Since then the word, I have frequently heard it but I never paid any attention to it.

Cross-examination.

I do not remember the name of the store in Albany that I refer to; just a cold drink stand. I was never there before and have not been since. It was just a drink stand, a kind of little confectionery stand. They drew the Koke out of a keg, a 5 gallon keg. He told me at the time where it came from. He said it is made over there, at some small town, maybe Cisco, something like that. I do not say it was Cisco, it was some little town out there, it is not far from there, is what he told me. I do not remember whether there was a label on the keg. At that time I was in the soda business and the word, I just heard it in the store. [1288] I had talked about Koke, fellows drinking Koke and so on and being great Koke drinkers. I do not know what drinks were referred

(Deposition of Dr. J. G. Pyle.)

to in that connection. I never had handled anything called Koke at that time, they may have been talking about Coca-Cola, and may have been talking about Koke. It might be possible and very probable a lot of people may call for Coca-Cola when they call for Koke. Maybe some shorten the name into Koke. I instructed my boys when we handled both if they call for Koke to give Koke and if they call for Coca-Cola to give Coca-Cola. I never did hear anyone kicking about it. If they wanted Coca-Cola and drank Koke they did not object. I tell them to do that because I never could tell the difference. I only handle Coca-Cola at our store now. The boys know we handled Coca-Cola and give Coca-Cola. I guess we do not give Koke because we do not handle it. The customers have not kicked. I handled the product of the Koke Company of Texas since they started this factory, the last 2 or 3 years. I had been out of business up to that time for 3 years and before I went out of business 3 years, which was in 1907, we used to handle Coca-Cola then. I used to be in business, we used to buy a stuff from Atlanta, something like it, it was called Cola-Ade. We mostly handled Coca-Cola those days. I do not remember when the name Koke got to be used. You hear it oftener the last few years than you used to. I cannot tell just when it come in. I do not remember when it started only I just remember that was the first time I heard it, it was at Albany and I might not have heard it called Koke, you know, at that time.

(Deposition of Dr. J. G. Pyle.)

There used to be a lot of talk about cocaine in Cola-Cola and people used to ask if it had cocaine in it, and that stuff. People would be talking about Coca-Cola and when that fellow—the reason I remember it, the reason I told him that, I said is it made out of cocaine, of course I knew it was not. I asked that to see what he knew about it and just by him calling it Koke I got that answer just to see what he would say. He said he did not know what it was made out of, of course he did not. He was just a confectionery fellow. He did not know what he was serving, he might have thought [1289] he was serving Coca-Cola. The time I was at Albany and had this experience with the product made at Cisco, was in September or October, 1904, as well as I can remember. My wife's people are out there and I was out there on a visit. That was the only time I was there, I know it was either 1904 or 1905. I think it was about the 1st of October. I was at that time in the drug business and had been about a year before and was handling Coca-Cola at our fountain. I do not know whether Coca-Cola was called Koke in 1903 or not. I never had heard it called Koke up to that time I was out there. I am satisfied of that, but the name is used more and more up till this day; it is used more now than before. A man calls for Koke and lots of times now I do not know whether he means Coca-Cola or Koke. Before the Koke Company of Texas started in Dallas, it is possible—I say it is not improbable, that they

(Deposition of Dr. J. G. Pyle.)

did call Coca-Cola Koke at that time; they may have done so. Before I bought anything from the Koke Company, I think I heard Coca-Cola called Koke, I could not say, I could not call any certain time when it was called Koke. I cannot remember when I ever heard it called that. As a rule you know a man calling for it I could say but I went out of business from 1907 to 1910. When we were handling this product of the Koke Company of Texas, we had two sections, two fountains, and we would keep the Coca-Cola there generally labeled, keep the Coca-Cola in a Coca-Cola label and the other keep it in some other label. We did not have any label made with the fountain for Koke. I think they kept it in simple syrup as well as I can remember. Koke syrup costs us less than Coca-Cola. I think I paid a dollar and a quarter for that and a dollar and a half for Coca-Cola, and the drink sells to the consumer at the same price, 5 cents a glass. If our dispensers mix them up they did not tell me, and they had instructions on that. There is no occasion for them not to know where the syrups were, no reason that they would not know what they were drawing when they drew it. If they gave Koke for Coca-Cola they knew that they did it. I did not label the fountain container that contained the syrup of the Koke Company of Texas. The label comes in [1290] a kind of little white marble something, in there you know with the name on it and I had no object in changing that, no occasion to do it absolutely. It would not be diffi-

(Deposition of Dr. J. G. Pyle.)

cult for the soda man to know which he was serving. I cannot tell the difference either in taste or appearance of Koke and Coca-Cola. The man who came in and asked for a Koke was served with the product of the Koke Company of Texas. That is what I instructed my boys to do. Of course I could not stand there and watch them and see what they were serving. I took it they did what I told them. If I thought they were not, I would not have kept them working. I always felt satisfied they were doing what I told them. They could have mistaken one for the other if they had been side by side and no labels on them. They could have gotten them mixed up, but we were very careful not to get one in the other; there was no reason to do so. Mr. McCarty Moore was not interested in the Palace Drug Company that I know of, and I owned it and I guess I know. I was never interested in the Koke Company of Texas, except in some stock I got from them on the purchases of Koke from them. I got the stock on the product that I handled.

Redirect Examination.

The reason I do not handle Koke now is when we went into business there my partner said he wanted to handle Coca-Cola. I told him to go ahead and use his own pleasure about it. That is Cecil V. Rogers. I think he is a good friend of Mr. Harris the Coca-Cola man.

GENERAL CRANE.—That is objected to.

(Deposition of Dr. J. G. Pyle.)

Objection overruled and appeal prayed and granted.

I have never seen Mr. Harris but twice, I think, since we formed the partnership. When we first started again up on Ross Avenue he was in there one day and then he was in the store once since we have been up there.

Recross-examination.

I cannot say for sure whether we ever had any advertising of the Koke Company of Texas in or about our fountain or store. It seems like we [1291] had some little cards about like those printed and set up on the fountain. I am not positive but since you said that, I believe we did.

Deposition of L. W. Ozier, for Defendants.

L. W. OZIER.

Direct Examination.

I am 33 years of age; at present I am here in Dallas, Texas. (A bottle marked Defendants' Exhibit #215.) I bought that bottle from a dealer in Waco, Texas, I do not know his name. I did not take any particular pains to get his name. I just went in there and got a drink. I noticed the case there and I just picked up, I think, about 8 of them, I picked up 8 and bought the whole business, 40 cents, I think, or 50 cents. He charged me 10 cents apiece for them because I kept the bottles. I asked him who he got them from.

General CRANE.—That is objected to as hearsay.

And he said the Coca-Cola Company, Bottling

(Deposition of L. W. Ozier.)

Company, Waco, Texas, and it was so labeled on the case. (A bottle marked Defendants' Exhibit #216.) I got that bottle at the same time I bought the others, they came out of the same case. (A bottle marked Defendants' Exhibit #217.) That belongs to the same bunch as #215 and #216, purchased at the same time and place and from the same party out of the same case. (Bottle marked Defendants' Exhibit #218.) I bought this from a bottler at McKinney, Texas, not the bottler, but a dealer at McKinney and asked him at the time who bottled it and he told me Mr. Crouse.

General CRANE.—That is objected to as hearsay.

Objection overruled and appeal prayed and granted.

He told me Mr. Crouse was the proprietor of the Coca-Cola bottling plant. The name on the case that bottle was in was the same name as the bottle, Coca-Cola Bottling Company, McKinney, Texas. (Bottle marked Defendants' Exhibit #219.) This was purchased at the same time that I purchased #215, #216 and #217; that is a bottle of chocolate soda water. (Bottle marked Defendants' Exhibit #220.) There is a stand just above the Interurban Depot at McKinney, it was rather warm and a friend of mine, I do not remember his name, he said, "Let's go and get a drink." I said, "Of course we will do that." We walked up to this little stand [1292] and I asked for a bottle of Coca-Cola and he gave it to me all right and I happened to see this sitting up on top of the counter. I asked him what that was.

(Deposition of L. W. Ozier.)

He said it was labeled. I looked at it and I noticed it is Iron Brew and I bought it from him, paid him a dime for it. I did not ask him where he got it. (a bottle marked Defendants' Exhibit #221.) I bought this from the same old fellow, I bought the 215, 216, 217 and 219 at the same time. (A bottle marked Defendants' Exhibit #222.) I bought this one at the same time I bought #220, bottled by the Coca-Cola Bottling plant at McKinney, Texas.

Mr. LITTLETON.—I tender and offer in evidence Exhibits 215 to 222, inclusive, as evidence on behalf of the defendants in the above-styled causes.

Mr. ROGERS.—They are objected to as irrelevant, incompetent and in this connection I wish it understood that the same tender with respect to Exhibits #189 to 213 are rejected too for the same reason.

Objection overruled and appeal prayed and granted.

Cross-examination.

I was formerly a salesman for the Koke Company of Texas. All of that stuff that I exhibited there cannot be any way that they could be identified unless they specified by the crown except the Iron Brew. They cannot be mistaken for Coca-Cola unless the crown is pulled off, and if the crown is taken off you could distinguish them by sampling. I did not ask for Coca-Cola, I just saw them labeled one thing and the bottle showing another. The Coca-Cola Company was using the Coca-Cola bottles for other drinks except Coca-Cola. Exhibits #221, 217,

(Deposition of L. W. Ozier.)

222, 218 and 215 are of a different color from Coca-Cola, you cannot mistake them by color. This chocolate, knowing the colors as I do, of course, it is not as light as Coca-Cola, it has on it a crown marked Chocolate. Exhibit #216 is marked on the crown "Grape." #220 is printed on the crown, "Iron Brew," Iron Brew, nonalcoholic. There is no such words printed on the Coca-Cola crown on Coca-Cola bottles. [1293]

Deposition of O. T. Maxwell, for Defendants.

O. T. MAXWELL.

Direct Examination.

I am 56 years old; I live in Fort Worth, Texas. Engaged in the wholesale drug business. The name of my concern is Maxwell-Clark Drug Company. This is a corporation. I am President and General Manager. We handled a syrup for making a soda-fountain beverage known as Koke. We began to handle that product quite a number of years ago, I suppose 5 or 6 years ago. When I first began to handle it I got it there in Fort Worth. J. C. Mayfield was making the syrup then. We have continuously handled it since then, or jobbed it. We have jobbed mighty little of anything else recently. We used to sell Coca-Cola quite extensively. We sold Coca-Cola contemporaneously with the sale of Koke. We had a call or communication from the Coca-Cola Company with respect to our handling this product Koke. I cannot remember the dates exactly, it was possibly two or three years ago we had—to begin

(Deposition of O. T. Maxwell.)

with we handled Coca-Cola ever since we established the business there. About 2 or 3 years ago we were notified that our orders would not be filled if we continued to handle substitute goods. I feel sure of their meaning Koke to be a substitute for their product. We were notified by the Coca-Cola people. When the matter first came up it was about the middle of the season, say July or August, and under their contract plan we had a number of our customers who had bought a barrel or two barrels up to that time of the season and to lose the amount they had bought would mean a loss in their rebate. I presume you gentlemen understand the rebate scheme of the Coca-Cola people. It would loose a certain amount of their rebates. I took the matter up with Mr. Candler when the orders were first refused and plead the case with him. In fact I am not so sure but what I may have misled him a little, at least I told him if he would fill those orders that I would be glad and I think I was good. But that was what he understood by my being good. He went to filling the orders and filled them during the season, the remaining part of the year. Then he notified us, did he notify us or I notify him—I would not be positive, but when the New Year came on I wanted a distinct understanding. [1294] I felt that he was entitled to it. I speak of Mr. Candler as the Coca-Cola people. I felt sure they were entitled to know just the ground we stood on and I further intimated that we would not be dictated to by any concern as to what we would sell. They were paid the spot cash for their goods

(Deposition of O. T. Maxwell.)

and we felt that we were entitled to sell goods that there was a demand for and they have refused to fill the orders and have refused to fill all orders since then. Mr. Candler refused to fill the orders for Coca-Cola. When I say I think I misled Mr. Candler, I meant really, I wanted those orders filled for the balance of that year because my customers would be at a loss and that he could take it as he darned please. I wanted him to fill those orders. After the first of the year he declined to fill our orders for Coca-Cola, simply because we had been handling Koke, that is the only reason that there could be so far as I know. We paid our account the 10th of each month following as is customary, taking our cash discount. We never had any complaint along that line.

Cross-examination.

I moved to Fort Worth in March, 1908. I moved from Cisco over there. I immediately engaged in the drug business, the name of the drug company, was originally Kendall-Clarke Drug Company, it is now Maxwell-Clarke. We began handling Koke after I went into the drug business, manufactured by J. C. Mayfield. It was manufactured first at Fort Worth. I do not know as I had ever handled any of it before. I do not know as I had ever heard of it before. I had lived at Cisco since 1883 to 1908, fifteen years. I do not think Mr. Candler based his objection to our selling Koke on the exclusive ground that Koke was a nickname for Coca-Cola and that we were thereby infringing upon their trademark of Coca-Cola. I do not know as he stated that. He

(Deposition of O. T. Maxwell.)

may have said that it was a fraudulent drink manufactured as a substitute for Coca-Cola and imposed on the public making the public believe it was Coca-Cola. We sell other soft drinks. We deal in Dr. Pepper's stuff. We deal in other soft drinks of the same kind. He made no objection to **[1295]** our selling any other soft drink. Dr. Pepper was never popular in Ft. Worth, there was a little sale on it, but nothing like—I did not sell as much of Dr. Pepper as I did of Koke. You are trying to get me to state what the Coca-Cola representatives objection was, I do not know his objection. I have not got the correspondence; I do not know whether I could find them, I suppose they have got them. (Carbon of the letter to the Maxwell-Clarke people and signed.) I would think that is a carbon of the letter I received. (Complainant's Exhibit #35.) I wrote this letter in reply. I think it is dated July 30, 1912. (Carbon copy of a letter signed D. B. Candler, Manager, addressed to Maxwell-Clarke Co., dated August 1, 1912.) I suppose that is the carbon copy of the letter we got from Mr. Candler in reply to our letter of the 30th. I think on the 23d of October, 1912, Mr. Candler wrote us another letter addressed to me personally as President of the Maxwell-Clarke Drug Company, this is a carbon copy. In answer to that on October 26th I wrote Mr. Candler, that is the letter. We were advised on January 3d by letter of Mr. Dan Candler that he would carry an account with us further, that is the copy of the letter. Between the time of those letters and the 3d of January,

(Deposition of O. T. Maxwell.)

this last letter, we had been taking orders for Koke, as we had been distributing Coca-Cola. I had to lie in order to get him to fill the orders. I felt I had a right to sell Koke as well as Coca-Cola. When I said I had a right to sell goods that there was a demand for, I meant that I had a right to sell Koke. Our salesmen handle it on the road, they take orders for it just like other goods, from retail drug-stores. We sell it to-day, we sell more to-day than before, we get it from New Orleans now, from the Southern Koke Company, limited. They closed the office here. I first handled it, I do not remember the year, 5 or 6 years ago, that would make it about 1909 or '10. It was made then in Fort Worth by J. C. Mayfield. The orders were turned over to us, just as many other orders, they sold the trade and turned the the orders over to our house and we filled them, they said if you will stock the goods we will give you orders just alike, for instance like the [1296] Coca-Cola boys would do, or Arrow-Cola and other things. J. C. Mayfield first came to us to interest us in selling Koke. I do not know whether I met him personally or possibly the buyer. I am not the buyer there, one cannot do it all you know. I suppose just like you would consider it, buying a drink similar to Coca-Cola, Mr. Candler thinks it is similar to Coca-Cola. Substituting is selling an article under a certain name and putting in an entirely different product. I could illustrate for instance, you take the drug line, you take Peacock's Bromidia put up by Peacock Company of St. Louis; there are other

(Deposition of O. T. Maxwell.)

preparations put up by different firms claiming to have the same result, a man would take that Peacock bottle, or a man come in and call for Peacock's Bromidia and he would take the other goods and sell it on that order, I would consider a substitute drink. Koke is cheaper than Coca-Cola. We get for it a dollar a gallon by the barrel. Coca-Cola, I suppose, is a dollar and a half with their rebate. I have not billed out any of it lately, when I billed it out it was a dollar and a half, and if you sell so many gallons you get a rebate at the end of the year. If you had sold two thousand gallons you would get twenty-five cents a gallon rebate. The price of Coca-Cola even with the rebates off is higher than the Koke to the trade. The Koke Company give no rebates. I do not know anything about that stock proposition, I have never been approached or interested in that. Koke cost us a dollar a gallon less 15 per cent, and 2 per cent for cash. Coca-Cola cost a dollar and a half and 3 per cent the 10th of the month following and then whatever rebate we could earn and we usually earned our 25 cents, that is the maximum rebate. Well, in the Coca-Cola proposition you do not get your rebate, I think they give rebates twice a year, possibly, that is provided the sales have been sufficient to justify under their plans of giving rebates, July 1st and January 1st. Anyway, we have got to carry it on, understand, anyway they work it. The other one is more to my idea of doing business. We bought what we sold and we paid for what we sold. We did not have to carry the profits or any of it to a

(Deposition of O. T. Maxwell.)

specific time of the year. It cost the retail trade, less than Coca-Cola. [1297]

Redirect Examination.

I know I have redeemed Coca-Cola but whether I have redeemed any Koke coupons or not, I do not know. I could not answer.

Mr. ROGERS.—We tender and offer in evidence as Defendants' Exhibits Nos. 35, etc., the correspondence introduced in the above exhibits.

Deposition of W. McCarty Moore, for Defendants.

W. McCARTY MOORE.

Direct Examination.

Thirty-eight years of age; reside 5015 Ross Avenue; Dallas, Texas. Lived here 6 years this coming July. I was connected with the Koke Company of Texas and the Southern Koke Company, Limited. I first became interested in the Koke Company of Texas—I am trying to refresh my memory on the exact starting point—it was about three years ago this last May that I first became interested in the Koke proposition. I had understood that there was a chemist who had formerly been with the Coca-Cola Company, or rather had formerly been a partner in the Coca-Cola business, who had been trying to compete with the Coca-Cola Company for years under various and sundry cola beverage names.

General CRANE.—We object to that as hearsay, except what he knows himself, about where he started.

(Deposition of W. McCarty Moore.)

Objection overruled and appeal prayed and granted.

I remember that I was once sent a Celery-Cola ticket and I presented it at the fountain of Smith Brothers at McKinney, Texas. I was told that they did not have the Celery-Cola but they could make a Celery-Cola by the addition of a little celery to Coca-Cola, that—that both beverages were made under practically the same formula, that the man who was making Celery-Cola was formerly interested with the Coca-Cola Company. That is my first recollection of any identity as between the two propositions, and this chemist's connection with it. I did not know him, and asked no questions whatever and when it occurred to me to become interested in a competitive business I went to Mr. Smith and inquired of him who this chemist was. And he told me that Mr. Massey could tell me, that he was interested with him here at that time in the manufacture [1298] of Celery-Cola and I looked up Mr. Massey and he told me that it was Mr. J. C. Mayfield who was making the beverage Koke in Fort Worth and it was being handled by his brother here, Mr. E. O. Massey here, at the time as his agent. I took the address from Mr. Massey and went over to Fort Worth. Mr. Mayfield, I was told, was at the time in Little Rock. Mr. Massey, I believe, wrote him that I was interested in the proposition. He showed me a large number of customers that he was selling to at the time, that was who I expressed an interest in it, I suppose.

General CRANE.—Pardon me; I don't want to

interrupt the witness' narrative but it is understood that those statements are objected to as hearsay.

Objection overruled and appeal prayed and granted.

Mr. Massey wrote Mr. Mayfield I was interested in his proposition and wanted to—in the meantime I think Mr. Massey told me that he had some option on Oklahoma and Mr. Mayfield wrote back to me a proposition on Oklahoma, for a sum of money, but I told him I would not be interested in Oklahoma alone but I had studied over the matter and I had a plan whereby I thought the business could be made a success along business lines, as an open and fair competitor of the Coca-Cola Company, and he wrote me then and I stated that if he would be in Little Rock for some time I would come up and see him, unless he intended to come down here soon. In the meantime, I think, his son came too, to see me, Mr. J. C. Mayfield, Jr. It was some little time, I think, possibly it might have been two or three weeks or longer, I do not remember just how long an interim between the time I first looked into the matter and the time I first went to Little Rock, but ultimately I went to Little Rock to see Mr. Mayfield. He was engaged in the business there. I examined the goods, went around to a number of fountains where he was selling it. I think he had some fifteen or sixteen customers and they all appeared to be well satisfied. Of course that interested me all the more. I made a proposition to associate myself with him and enlarge the business. He gave me what is a binder to that

(Deposition of W. McCarty Moore.)

contract, the contract covered something [1299] like fourteen states as a binder to that and I purchased outright the rights in Oklahoma and Kansas. In each of the states we would organize companies and put the business to going, Oklahoma first. I came back to Dallas and immediately took up the matter with some friends of mine, I do not remember just exactly who they were but Mr. Boyd eventually became interested with me in the proposition and I agreed to let him become an equal owner and he interested some parties and we started to organize the Koke Company of Texas here at Dallas. I am not just positive, but I think we began negotiations with Mr. Clarke about the same time. It may have been prior to the organization of the company or it may have been immediately after, but anyway, as he had a contract with Mr. Mayfield over a period of time, I am not sure whether it was one year or two years, and we finally closed the deal with Mr. Clark and gave him a thousand dollars to relinquish his contract with Mr. Mayfield, and he consenting, if he did, if we bought him out to turn over and let us have Texas on a certain basis. We closed the deal with Mr. Clark and that was the basis of the organization of the Koke Company of Texas. That is, as near as I can remember, it has been some 3 or 3½ years ago, we began something like May—that is the best I can remember. I was its president. The Koke Company of Texas has advertised its product Koke. I think the first one was a ticket, tickets were really prepared and ready for distribution, I think, even be-

(Deposition of W. McCarty Moore.)

fore any sales were made from this office, possibly, and the Ft. Worth office, when we took it over, had a ticket. I did not think them very attractive and I had an artist here to get up a design of a ticket that I thought would be a regular and constant reminder. It was a calendar, it had a calendar on the back and Koke advertisement on the face, you tear the coupon off the end and cash it and the intent was to keep that calendar in the pocket as a reminder of the fact that he had drank a Koke. (Defendants' Exhibit #95.) That is the ticket I refer to. These tickets after they were printed, a large number of them were distributed here in Dallas and we had a proposition as well as I can remember, [1300] the records will show better and more clearly than my statement perhaps, whereby with each barrel, the first barrel, the customer was furnished a blank to furnish us two hundred—I am not positive whether one hundred or two hundred names, I really think it was two hundred—I know it was, I am almost sure it was two hundred names, of his customers. We promised to send them a circular letter stating that we were enclosing them a ticket which would entitle them to a free drink of Koke at the fountain of this customer and that he also carried, in addition to Koke, which we praised in the circular letter, other articles of merchandise and something else. I would think I had some of those old circulars left on hand, I am not positive. I am not attending to the office detail work. I have never officed with the Koke Company, my office has always been separate and apart. I will

(Deposition of W. McCarty Moore.)

search and if I can find them I will produce and file them as exhibits in this case. I think we should have them for the reason they were sent in and kept in a way, as a voucher, and should be there. We advertised in publications, one of them I think was a postal guide, and, oh, I cannot recall the names of them now, but they were local Dallas publications that all business people advertise in, you know, to help some proposition along, most of them we advertised in. (Defendants' Exhibit #118.) The advertisement in there on orange colored paper is an advertisement of the Koke Company of Texas, a sample of some of the advertising they have done. Hangers, posters and things of that sort was gotten out. I think you call it a celluloid medallion, I believe you would call it, we had gotten up. They were to hang on the fountain and dispensing bottles, little souvenirs where gotten out, match-safes, knives, I recall now the company's name and address on it, and Drink Delicious Koke, something like that on them. (Defendants' Exhibit #59) is a Koke label and having my name, "W. McCarty Moore, Pt.," that label happened to be gotten up because having the exclusive right to the use of Koke the sale of Koke in Texas, we did not propose to give more than one bottler the right or privilege to sell it in a locality and we felt the necessity [1301] of having labels on the bottles to show his authority for the sale of it, and we were not experienced in the business, whatever, in the beginning and we really presumed that it was a requirement, a rule, a legal require-

ment, to prevent an infringement or to use a label. I gathered up a number of types of labels, I had one a square one that Mr. Mayfield had been using down here at Shreveport, I gathered up that and a number of others and I went to Mr. Shuhler here, an artist. He had previously gotten up the letter-head for the company and some cuts of various printed matter and when we came to the bottling end of the business, why, I went to him to get up a label and I submitted these different labels. It was finally decided on this type of label from the fact that we thought it would adhere to the bottle and had them printed. I mean that shape rather, and while it appears to be an almost facsimile of the Coca-Cola Company's label, and in some respect it may be, that is the wording around the border and the script name of the president. Well, it occurred to me, I asked for no advice in the matter, but it occurred to me that the Coca-Cola Company, in putting out a label and having been in the business as long as they had, they put it out under the advice of an attorney and with a knowledge of the kind of labels required to make it legal and that is why I came to put the name on there just as I did. The word Koke was put in there in as large a script as it could be printed. The line at the top and the crown at the bottom with Koke on it, and there was no intent or purpose to make a deceptive label or label that would appear to a customer that it was Coca-Cola and not Koke, the idea of getting up the label was to make it distinctly a Koke label so far as the word Koke was put in there,

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in as large type as we could put it. I had my name signed to that label because I thought it was necessary in order to make the bottler bottle our goods and every label that we printed to advertise our goods, that was what I thought about it, and whether if we furnished that label and he put it up and *and* put that on there with the signature on it that if he used it on anything else, there was another cola beverage being sold here at the [1302] time, being sold cheaper than we were selling ours, known as Texas-Cola or Koke, something like that and also True-Cola and also to keep some check on the bottler, we furnished him so many labels and we figured out how many labels would be required to use so many gallons and we proposed to sell him the labels necessary to bottle, that is use them at the rate of about 120 labels to a gallon. As well as I can remember Mr. Mayfield gave us the address, wrote us a letter regarding the matter of cuts first about some friend of his that he stated in this letter that he had been dealing with for quite a long time, some fifteen years, something like that, it might possible be found now no doubt, the letter is on our files. We wrote to this printer and he gave us the price. We wanted a two colored label the best of my recollection is, and we wanted a label as he had been used to supplying, I presume that he knew his business, label business rather. We gave him the order, we waited a time and did not hear from them. We wrote them. He promised them as well as I can remember, but it came on up to the bottling season, we were shipping goods

to the bottler and we could not get them from him and had to cancel the order. I think he had gone out or changed his business. I do not know just how it was but we then took it up with the local printers here and they said if we would pay for the additional cuts required so they could run them off, a large number at a time, while they were not especially prepared for that kind of work, but they would run them off for us and in the emergency we had them run off here. I think the emergency before us was also due to the fact that we were short of crowns and the Crown Cork & Seal Company did not have them here in stock and we were only able to get a few from a competitor who had some in stock, the Crown Cork & Seal Company gave us permission to buy them from a competitor of theirs and in the emergency I think they considered that fact and they would have objected to the use of these crowns with their machines on any bottle otherwise. The reason the label happened to be printed in blue to my best recollection is that he stated that he could only print it in one of two colors, that is he **[1303]** was only prepared to, that is used either blue or black ink. Mr. Padgett supplied them. He was a printer in the printing business here for himself and Mr. Padgett had done work for me over a period of 5 or 6 years. I took it up with him knowing if he could not do it himself he would know where to place it. I do not know whether he did the work. He has billed us for the work and we paid him, whoever he turned the work over to I do not know about that, I do not remem-

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ber. I do not remember what instructions I gave him if any relative to the manner he was to print the label; it was to be of the colors, so far as I remember either blue or black, I do not remember whether any color was specified or not, I really do not think so. I rather think that was a matter of what he thought he could—how he thought he could *but* turn out the job. In getting up that label, it was not our design to imitate Coca-Cola labels so as to enable our goods to be passed off as Coca-Cola. We sent some labels similar to that to the Southern Koke Company, Limited, at New Orleans, when it was organized. I received a communication from Mr. Mayfield suggesting the discontinuance of the use of that label. I was the President and he put it up to me as a suggestion that we discontinue the use of it. I did not pay much attention to it at first. Until it was called to my attention again, from Mr. Mayfield who wrote again about it. I wrote him to know his reasons for it at the time, I wrote him to know his reasons for it and he cited some cases, some decision or something that gave him a suggestion that we might be infringing by it and to be on the safe side that we should change the color as he wanted to stay absolutely away from appearances of infringement and as they were not sending them out then I told Mr. Van Winkle not to send them out any more as the Crown Cork & Seal Company was getting out a large stock of crowns and we did not feel the necessity of sending them out further. And did not send out any more except a very few as we had no orders

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for them then. We sent a very few to the bottlers who were bottling under our franchises. Some of the labels that were sent up to the printer were a Coca-Cola label, I think it was the Gay-Ola label, and [1304] either Jersey Creme or Dr. Pepper, my recollection is that I had some three or four and this square label that Mr. Mayfield had. I did not send them up, or rather I worked with him, we kind of plotted it out together. I told our salesman to sell Koke as Koke and to impress our customers that we *made and* that they became at the same time a stockholder as well as a customer, that the object and purpose of enlisting them as a stockholder was for the purpose of building up a cooperative business and to help us do business in the most direct way and manner. My plan and object you might state is this, I do ask*ed* them to instruct the customers, when you have a call for Koke give them Koke, if they call for Coca-Cola give them Coca-Cola and when a man calls for Coca-Cola ask him if you might not give him a Koke, and invariably he would ask you if there was any difference, state to him that there was. Koke was made by the Koke Company of Texas, in which you were a stockholder and of course interested in pushing it and Coca-Cola was manufactured by the Coca-Cola Company if he did not like Koke and afterwards called for Coca-Cola that he would always get what he called for at your fountain. Those positive instructions that can be verified by any number, I think, of people. I exercised no control or authority whatever over the bottlers with reference to the

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shape, size or style of bottle that they put up this Koke in. We never handled any bottles whatever. We sold the syrup, only sold the syrup and notified the Crown Cork & Seal Company that we had contracted with this bottler or that bottler and to supply him on his orders for all crowns if they felt fit to do so, we did not sell them crowns, in a few instances we may have obtained them for the bottler, I do not remember. If any of our salesmen told any customer that they could substitute Koke for Coca-Cola or advised them that they could substitute Koke for Coca-Cola. I have no recollection of it, I did not approve of any such conduct. I never acquiesced or winked at any such conduct, in no way, shape or form. I never authorized any such conduct. I would have discharged the man if I had learned of him being guilty of it. Now as to what system the [1305] customer may have had that was a different proposition, but as I have explained to you I gave them a basis on which to put the proposition up to the customers and it was along that line that I was attempting to build up a competitive business. I wanted it to be a competitive business or no business at all, that was my idea entirely. The Reiner-Kelley Drug Company was a jobber of our product Koke, they quit jobbing Koke afterwards. As to the amount of orders which they had placed that were turned back to us, Mr. Boyd can give you, I guess nearer the exact amount than Pan Winkle or I can. My best recollection is it was something in the neighborhood of either ten thousand gallons or ten thou-

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sand dollars of contracted business. He had some, I think 25 or 5 customers here in Dallas and Reiner-Kelley—he took those orders and turned them over to Reiner-Kelley. I think they O.K.'d most all of them, the business that he secured here in Dallas they accepted them. In regard to putting a dash of celery in a glass of Coca-Cola—I was sent a Celery-Cola ticket from Dallas, I think it was, as were also a large number of other people I presume, as a buying campaign. I presented that ticket to the fountain of Smith Brothers, McKinney, Texas, Mr. C. W. Smith, I think it is C. W., who is in the Smith's Pharmacy here in Dallas and was then the dispenser. I said "give me a Celery-Cola, Charley." He said, "Mac, we have not got the Celery-Cola but I can make you one, you have got a ticket haven't you?" I said "yes." He said, "well, we have not got the Celery-Cola but I can make you one." I said, "don't go to that trouble." He said, "that is no trouble, all I have to do is put Celery in Coca-Cola and you have Celery-Cola as both Celery-Cola and Coca-Cola used to be made by the same formula or by men who used to be in the Coca-Cola business, I am not positive, but any way it was made from this same formula and one had the addition of celery." I know that I jollied him quite a good deal about it and I would go to the fountain and when I went to the soda-fountain after that he would ask me what I would have and I would invariably say anything but a belly-ache and he knew what I meant. Try to put celery in Coca-Cola or any other cola beverage and

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[1306] you will find that it will colic, at least it always did me, I do not think I tried it more than once after that.

Cross-examination.

My present business is mining. I was not connected with the Koke Company exclusively. I have been in the mining business some 6 or 7 years, and the Koke business was carried on incidentally. My first connection with any of these Koke companies was about December, 1910, my business then was mining. I have been in the mining business 7 years now I was not actively but interested in the drug business about three years ago. I was connected with the Koke Company during the time. I had never been in the drug business or had any connection with the soft drink business of any sort prior to my connection with the Koke Company. I knew of the product Coca-Cola and had known it for quite a long while, I knew it was well advertised and a popular drink and I thought in getting into the Koke Company or going into the soft drink business was to compete with Coca-Cola. The Koke Company was known as a competitor of the Coca-Cola Company and Koke as a competitor of Coca-Cola. That was what I went into the business for. Mr. Mayfield was not mentioned by Mr. Smith. The only thing I can remember is, well and distinctly, is the fact that he told me both were manufactured by identically the same formula, and Celery-Cola is made by a man who used to make Coca-Cola. When I thought of engaging in the business the gentleman

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that directed me to Mr. Mayfield was Mr. Massey, Mr. Smith telling me that Mr. Massey was interested and could tell me who it was. That was possibly eight years ago. I thought of it a great deal for a long while before I did go into this business; in fact Massey came to me once; I had some business transactions with Massey about stock, a loan and life stock and I remember asking him how he was doing in the business and he went on to tell me of the great business it could be made. Celery-Cola it was called, that it was equally as good a drink as Coca-Cola and the name Celery-Cola made it more popular, would make it more popular, if it was handled properly, but I was not induced to go into it with Mr. Massey. I went up afterward to Little Rock. [1307] That was May or June, I think it was a few days prior to the 1st of June I went around to the soda-fountains up there and heard people asking for Koke. I had never paid any particular attention to that. Mr. Mayfield took me to a fountain showing me his goods and asked them to make a statement to me of the satisfaction it was giving. I asked about the merits of the goods and the satisfaction it had given. I presume Coca-Cola was mentioned, I could not say whether it was or not.

Q. Mr. Moore, had you ever heard anybody ask for Koke or use the word Koke at a soda-fountain prior to that time?

Mr. LITTLETON.—Now, we wish to interpose an objection because he is seeking to cross-examine

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the witness on matter not based on the direct testimony.

Objection overruled and appeal prayed and granted.

A. Yes, sir. If you want a specific case, I remember quite well at this same fountain of Smith Brothers at McKinney, where I bought a drink quite often, several times a day. I never did drink Coca-Cola and it was just due to the fact that I had a ticket possibly, I had one glass, I never could drink it because it unnerved me so, it was not a very palatable drink. I did not drink and I did not drink Koke very much. They were handling Coca-Cola and making Celery-Cola when anyone called for that.

A. That fountain people asked for Koke. I could not say what was served to them in response to that request, it might have been Coca-Cola, I presume it was, it might have been some other cola beverage, I was not acquainted with the business and could not say. I do not suppose I have drank as much as a half dozen glasses of Coca-Cola in my life; no cola beverage agrees with me. I took those various labels to the printer and took the square label that Mr. Mayfield said he had been using at Shreveport. I took a Coca-Cola label, and I do not remember whether it was Dr. Pepper's label or Jersey Creme, I think it was one, possibly Dr. Pepper, or it might have been Pepsin, I think I had some three or four labels, I am right sure I had a Gay-Ola label, if I am not mistaken, that I won't be positive about, but I know two that I had positively, and that was the

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square label of Mr. Mayfield's, it had Koke on it in script [1308] and the Coca-Cola label, and I think a Jersey Creme label. I discussed with him the advisability of a square label or a diamond label. The printer followed the Coca-Cola label out more closely in the Koke label than he did follow the Mayfield label. If we had made an exact fac-simile label at the time, using the work Koke on it, I for myself would not have felt I was doing it for the purpose of any infringement or deception. I here acknowledge and state I had no experience whatever. I was advised I had the right to use the name Koke. I presume the question was discussed at the interview we had with counsel, that Koke was used by the public as an abbreviation for Coca-Cola. I am pretty sure we discussed mighty near everything that was possible to discuss regarding it. I know I went very carefully into it and discussed every possible phase of it. We were advised we had no right to sell our product as and for Coca-Cola when Coca-Cola was asked for, of course, and vice versa that they had no right to sell Coca-Cola when Koke was called for. I was advised that Koke had been registered and that registration gave us the exclusive right. The Koke Company had the right to use it as applicable to the product it was marketing under that name. The registration gave that right on that registration and it was further backed up by statements that Mr. Mayfield furnished us even prior to that when we went into that with our attorney who was pretty well versed in the matter of

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trademarks and trade rights and trade competition, so I thought, and he went back as far as he could go back in every respect regarding Mr. Mayfield's legal right to it. Mr. Mayfield furnished our attorneys opinions—his Nashville attorney's opinion, my recollection is stating his right and wherein he had never parted from his rights and also furnished us affidavits regarding his original connection with—Bloodworth Murphy, whoever it was, three or four of them when they were in with Dr. Pemberton, and a statement from this firm of attorneys to the effect that they would take the suit for his interest in the Coca-Cola Company for a percentage, something to that effect and went on to show the whys and wherefores as to his rights. That affidavit was the affidavit signed by Mrs. Pemberton. I instructed our men to tell the purchaser that he [1309] was not to sell Koke for Coca-Cola. When he called for Koke to give him Koke. I instructed our salesmen in that way because I had looked carefully into the matter of the Coca-Cola suits—the Gay-Ola competition with Coca-Cola. It was declared to be unfair for the reason that they went to the fountain people and bottlers and furnished them a substitute pure and simple, as a substitute for Coca-Cola and to be put out under Coca-Cola crowns and Coca-Cola labels. I did not propose to engage in a business of that kind. I proposed to let it be known by every body that there was a Koke and Koke trademark, and if they did not want to use and call for Koke, but to call for Coca-Cola and not Koke that was my

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object and my aim. I would just as soon put it out under some other name, I could have done better, I guess. Perhaps it would have avoided suits that we have had brought against us and possibly competition which has existed between Koke and Coca-Cola. I never sold any Koke to the Waco Drug Company personally, and never had any interview with anybody over at the Waco Drug Company. We had a traveling man by the name of N. L. Moore, no relation of mine, that is where the confusion might have come up. I might have sold one or two isolated cases, only when I went out on different business. The name of the drug company was Empire Drug Company, in Dallas, formerly the Thurman Drug Company; they were using Koke, however, prior to my becoming interested in the company. They had a contract with the Koke Company. Mr. Boyd obtained the contract as I remember.

Deposition of J. A. Hodge, for Defendants.

J. A. HODGE.

Direct Examination.

I am 37 years old in July. I am agent in Texas for the Illinois Glass Company. I am manager of the local store. Defendants' Exhibit #223 is a stock bottle that we carry in stock, it is not a special design made up for any particular concern, it is what we call a machine made dispensing bottle, the only form of the kind we have. We have never sold that to the Coca-Cola Company. We sold to the Jersey Creme Company in Ft. Worth and Hughes Brothers in Dal-

(Deposition of J. A. Hodge.)

las, A. M. Brown in Dallas, and sold to the various decorators for stock packages; some of the decorations that have been on there were True-Cola for Hughes Brothers; Koke for [1310] Koke Company, Howel's Orange Juice, and Grape Juice for the Jersey Creme Company. That is the cheapest thing we have, we sold some of these bottles to the Koke Company of Texas. I have a copy here of our invoice the only one we ever entered, one bill which went forward from the house on June 16, 1913. Defendants' Exhibit #224 is a carbon copy of the bill sent over at the time the shipment was made, that is a carbon copy of the bill. Defendants' Exhibit #225 is the bottle we sold the Koke Company of Texas. There is a mark on the bottle showing, it is an automatic machine made bottle, the peculiar mark at the end of the glass where it is cut off, the automatic machine makes that mark on every bottle and no other kind of bottle has that mark on it. I do not remember what was said if anything by the representative of the Koke Company when he came to purchase that bottle. I have no clear recollection of the conversation. I was sent for by some party in the Southwestern Building, I do not remember the man's name. He told me he was getting up this company and was going to use a bottle. Soon after they opened up the place and I sold them other things. I have not seen that man since. He did not tell me anything about any particular design, just the cheapest thing we had, and this as a matter of fact is the cheapest. We formerly made this bottle up by hand and

(Deposition of J. A. Hodge.)

it run as high as $18 a gross and then when we made it by machine, machine made bottle it took off 33⅓% in price.

Cross-examination.

We had bottles of other shapes, but our trade is confined almost entirely to this since the machine has taken the place of workmen, making the bottles by hand, we only make this one, if I was asked about selling any other kind, I do not think I can sell any other kind of bottle.

Redirect Examination.

That condition was not true in 1913, we had other stlyes at that time. It was a question of price. The other styles are more expensive than those, they are hand made.

STIPULATION.

By Mr. ROGERS.—It is stipulated that the applicant [1311] and opposer may offer in evidence with the same force and effect as if duly exemplified under the laws of the United States, certified copies of the charters of the Koke Company of America, the Southern Koke Company, Limited, and the Koke Company of Texas, and that W. M. Moore and W. McCarty Moore named therein is one and the same person. It is stipulated that the matchbox produced as the specimen of the box referred to in the deposition of Mr. Van Winkle may be filed as Defendants' Exhibit #226.

Mr. ROGERS.—Said certified copies of the charters of the Koke Company of America, Southern

(Deposition of J. A. Hodge.)

Koke Company, Limited, and Koke Company of Texas are here offered in evidence as Complainants' Exhibits #41, 42 and 43.

Deposition of C. J. Thornton, for Defendants.

C. J. THORNTON.

Direct Examination.

Thirty-seven years of age, live in Hattiesburg, Mississippi. I came here in August, 1896. I am not doing anything now. The last business I was engaged in was the drug business. The name of my drug store was Corner Drug Store. I was engaged in that business from October, 1911 until January, I believe, 1915. I had a soda fountain in my drug store. I never was in the drug business before that, never operated a soda fountain, anything of that sort. I dispensed at my soda fountain a general line of all flavors and I sold Afri-Cola, Coca-Cola, Dope, Konut, Luck-Ola. I never sold any Gay-Ola. When customers came into my soda fountain and wanted a cola drink, I kept track once and 90 per cent would call Dope. When they called for Dope I gave them anything I had in the line of Konut and Gay-Ola, I mean Afri-Cola, Koke or Dope, any cola drink. When my customers came in and asked for Dope and I served them Ko-Nut Dope or Luck-Ola, I considered I was giving them what they asked for. I never had any customers refuse any drink served when asked for Dope, on the ground it was not what he asked for. The color of these cola drinks is something like the color of rootbeer, colored with caramel

(Deposition of C. J. Thornton.)

coloring, I was always told. The color of the various cola drinks compare very similar with each other, they all taste alike to me. I never saw a cola [1312] drink that was not of the same general color and taste. These various cola syrups come in red barrels and kegs. I never got a syrup or extract for a cola beverage that did not come in a red barrel or keg. I have heard people call for Dope ever since there has been a cola on the market. I have heard Dr. Pepper's called Dope. I do not know where it is made, I used to drink it and I called for it as dope. It is supposed to be good for headaches. When customers come in and ask for a Dope I do not consider they are making a definite and specific request on me for Coca-Cola exclusively. Take Dr. Pepper's, that is the first I ever heard called Dope, and, oh, that has been about 5 years ago I was in Shreveport I heard it called Dope. I hardly ever hear Koke, I do not believe while I have had a fountain—first, let's see, about 3 or 4 years ago some stockmen came in here from Ft. Worth, you do not hear much Koke called for around here, but they would go and call for Koke, they were here with some stock at the stable. The word Dope as applied to a soda fountain beverage means any cola drink. I have had them come in and commence—"You make a good dope here, I don't like the Owl's dope, the Owl or Yellow Pine, the Owl's Dope, the Yellow Pine served good "Dope." I had a call from a representative of the Coca-Cola Company last summer, sometime or spring. There was a little fellow through here that used to come through

(Deposition of C. J. Thornton.)

about twice a year representing the Cola-Cola Company. There was a fellow last April or May came into the store, and said he was from Atlanta from Candler and Hirsch—Thompson, Candler & Hirsch, I believe it was who represented he was out of their office and represented the Coca-Cola people. He said he was an attorney. He told me his name, he introduced himself. That looks like the gentleman, Mr. Pierce, here, the chief detective for the Coca-Cola Company.

Mr. PIERCE.—We object to that, there is nothing in the record to show that I am a detective.

Objection overruled and appeal prayed and granted.

That is the gentleman. (Indicating Mr. Pierce.) I never saw him but once I seen him in the store there, it was about, let's see, April I think. [1313] I went over there in April the 1st. I may get the months wrong, I do not know but it was the month I moved after I went over there on the corner—it must have been April and the man came in there and said he represented the Coca-Cola Company, he was out of the—let me see, the attorneys, Thompson, Candler & Hirsch, I know it had the Candler in it because I remember the name Candler on account of the old man Candler and he said they had me dead-to-right, for substituting Coca-Cola and if I would sign a contract not to sell any other drink made by other people that I could escape prosecution and that it was a violation of the law and I was also liable to civil action for damages but if I would not do it and

(Deposition of C. J. Thornton.)

sign this contract and use Coca-Cola that there would be nothing more, that the Yellow Pine had agreed to do it, the Love Drug Company had agreed to sign it or had signed it and that Hays & Field was going to quit and everybody but N. F. Williams at the Owl Drug Store, and he said he got mighty raw, mighty raw. I told him I could not do that. I said I cannot see any difference in it and I said, ever since I have been in the business, or knew anything about it people called for a Dope, they wanted a cola drink and he says, "We claim the right for the word Dope and if they ask for Dope they want Coca-Cola and we want you to give them Coca-Cola." He said, "We have set aside, the Coca-Cola people," I think he said, "Three Million dollars," some big sum and he said, "the old man is making donations—I thought at the time and do yet that he meant old man Candler, owner of the Coca-Cola business, I was always told that he did own it, practically all of it—that they had two million dollars set aside to prosecute and put the other people out of business and they could do it. By other people I mean the people that sold Dope, Koke and went on and called over, and he said that they broke the Gay-Ola people, he guessed the Gay-Ola people, he said they are busted. He said, I do not think they are making any more now. I told him, I did not think their man had been around in 6 months, that I knew of and he said it is only a matter of time until you cannot get anything but Coca-Cola and he said that they put them out of business [1314] and he said we will do it with the others, we

(Deposition of C. J. Thornton.)

have got the money to do it. He said, if a man calls for a Dope, he said you know as well as you know you are sitting there that he wants Coca-Cola. I told him I always sold Coca-Cola when they asked for Coca-Cola. That if I did not have it I told them that I did not have it, and at that time I did not have Coca-Cola for a week or time, because I had applied to Crow, had sent down there to get some more and he said that he could not do it. I had gotten several gallons from him to serve when they asked for Coca-Cola. He said, I cannot let you have any more, you can buy a barrel or 10 gallons. I said, Mr. Crow, I do not want to buy a $72.00 barrel and if I get less than that I do not want it as I cannot use enough of it and get the discount off, so as to bring it down to anything like the other costs. And I said, I really like the other drink better and I have several customers that prefer it and I thought when I run out I would send down and get some from some of the other drug stores until they would not let me have any. They told me they could not let me have any more and that was after a young Coca-Cola man was in here, a little fellow and a mighty nice little fellow. It seemed that he was going to place on their doors or wanted the men, the clerks to tell him what they had sold in a certain time of *pure* Pure Coca-Cola. He said he was going to fix up these and if they would quit the others and sell his stuff he would make it nice. He never tried to force me, that other fellow did not, to do anything. As a result of this conversation, I refused to sign the contract. After my refusal to

(Deposition of C. J. Thornton.)

sign the contract he said, " You are very frank about it." He said, "I will say this much, you acted nicer about it than Williams" and he said Williams got mad. I said, "I won't get mad because you people can put me out of business if you want to because you have the money to do it with, and I said, "You cannot make me sell something that I know people do not want. I have got lots of customers that if I have got the straight Coca-Cola in there and they come in and ask for a Dope, they won't like it and because of another thing it will take more of your syrup to make a drink, it is not thick **[1315]** and heavy like it used to be and it takes more of it to make a good drink than it used to take." He said, "Well, will you write what you stated to me—will you write out that and address me at the hotel?" I said, "No, I won't do that." He said, "What are you going to do?" I said, "I am going to keep on selling as I have been selling." He said, "I am sorry but we will have to fulfill our promise." He said, "You will have a suit brought against you in a short time." I told him I suppose I would get out of it in some way and if I did not they could take the place. When this Coca-Cola representative came to me and charged me with substituting I had not been substituting. If I ever substituted it was at sometime when I was selling something else besides the Dope made in New Orleans. I told him I thought I would be substituting if a man came in and called for a Dope and I gave him Coca-Cola, but he said we claim that name Dope because we were the originators of the Coca-Cola drink and people ask for Coca-

(Deposition of C. J. Thornton.)

Cola by the name of Dope before they ever heard of Dope. And I told him I was told by the representative of the Koke Company that Dope was a registered trademark and Koke was a registered trademark. "Well," he said, "they may tell you that, but," he said, "it is not so." The Coca-Cola company carried out their threat and brought suit against me. They brought suit against the Corner Drug Store. I will produce and file as an exhibit to my testimony, a certified copy of the bill and answer in that case, the suit they brought against me.

Cross-examination.

In 1911 the Corner Drug Company was supposed to be incorporated, a corporation. I owned stock in it. I borrowed the money from my mother in law, Mrs. George A. Mason. I do not know who it was that incorporated it. I can produce the charter. I will file a copy of it. I think the corporation was perfected. I was told by the attorney Bob Hale. I do not know whether they ever issued stock or not. I do not remember now. I do not know whether there was ever a stockholders' meeting. I owned all of the stock. This suit was brought against the Corner Drug Store. Mr. Hannah made answer to it. I do not know whose names were **[1316]** placed upon the answer. I think he told me theirs would have to be there, he said their names would have to be there as owners, because the suit was brought against the Corner Drug Store and them as owners. As a matter of fact, they were not the owners of the business. I owned it, that is, through the corporation. I was the

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owner of the stock then. That corporation went through bankruptcy before I had any interest in it. The bid was made for the Corner Drug Store along with the petition in bankruptcy provided it never closed its doors and never quit business, it would pay dollar for dollar for the business as it stood. I bought the assets from the trustee in bankruptcy. With reference to the charter they said they would fix it up for me. I do not know; they got the fee, the attorney, whoever it was, I tell you I do not know who the attorney was. They said they would attend to it and fix it up. I know Mr. Haney promised to do it. He was temporary trustee, I think, is that what they call it, temporary trustee, and he did not tell me anything different from that, and I think Mr. Haney was appointed permanent trustee, maybe, if they had one, because the referee came over and sold it. He sold it before the 15 days, I believe. I always told them it was a corporation, told them it was nobody's business who owned it. I did not deny that I had any pecuniary interest in it personally. The sheriff came to me with some executions and threatened to levy on the business. I did not tell him that I owned nothing in there; I told him to go and get a bond before he got on. I said you go and get an indemnity bond before you get on this drug-store. I did that to keep him off of it, because I did not want to close it up for what I owed. I told them every time I had a chance that it was a corporation. They never asked me who owned the stock in it. I did not testify in Judge Fairley's court that I did not have any interest in it.

(Deposition of C. J. Thornton.)

There never was any attempt to seize that property except one time when the fellow said something about getting on it, and I told him to get a bond. I have been in the drug business in Hattiesburg since about 1911. I used to drink a heap of these various beverages prior to that time. I have heard Dope [1317] ever since I have heard of dope, about 18 years ago, I asked for Dope and got a drink of Dr. Pepper's. I do not know the names of them; I would not know the names of the different syrups and things like that. The first time, 18 years ago, was Dr. Pepper, was the first I ever called Dope. I do not think Dr. Pepper's is a cola drink. Eighteen years ago I was in Vicksburg, right along there was Coca-Cola. Fifteen years ago they asked for Dope and they got it in a little keg in Vicksburg. They got something in a keg and mixed it, a small keg, and they called that Dope. I do not know what it was. I do not even know that Coca-Cola was on the market 18 years ago or not. The last cola beverage I handled in my fountain at the Corner Drug Store before I went out of business was Coca-Cola. At Dallas, Texas, I did not have anything but Coca-Cola. I have been handling Coca-Cola exclusively, I reckon, about 2 weeks. Prior to that I handled Dope; the product of the Southern Koke Company, Limited, of New Orleans. I handled that about a year. I handled Coca-Cola during that time. I have been out of Coca-Cola, I reckon, during that time, but sometimes, as much as one time I was out about three days and I got a keg out of Meridian. Prior to this product

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Dope I handled Luck-Ola. I would have a barrel of Konut, a barrel of Luck-Ola, I have got a barrel of Tru-Cola, some time; I think Hagan & Dodd made that. I do not remember how many barrels of Tru-Cola I got. I thought I got it from Hagan & Dodd here, but I am not sure. Hagan & Dodd handle Konut. I had Afri-Cola when I first went in down there in October, 1911. They had some Afri-Cola there; it was a syrup-like extract; it had syrup in it, heavy stuff; I had to make it up. All that time we were handling Coco-Cola, too. We kept these different drinks in different parts of the fountain; we changed it around at different places; we had one here, over to the left, on account of the pump getting out of fix. I knew where the various drinks were kept in the fountain most all the time. I could not tell you to save my life the number of containers in our fountain. There are containers—this is the center, that is the draft arm right there; there is, I think that goes out this way, but I do not know [1318] if any go out that way the other side. I do not know how many is there, but we will put—I will put down twelve, but I do not know how many is on it; this is towards the door when you go in. We will make this draft arm #1—or "A" rather first container to your right mark "B"; in that was Orange. "C," just prior to the time I went out of business Coca-Cola; Coca-Cola was in "D" when I quit. "E" was busted; I do not think there was anything in that. "F" was supposed to be pineapple. "G," I believe, was busted. I do not think there was any more con-

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tainers on that, there was nothing up that way at that time. We will go to the left, "H" was Lemon. "I" was Root beer, "J" was strawberry, "K," I think, was busted. "L" was plain syrup, I believe—no, I believe the plain syrup was here. "K" was busted, I think the rest are busted, nothing at all except orange, lemon, strawberry and pineapple; that was prior to January, 1915. Up until the 1st of January, I had Coco-Cola in "C," and I had Dope in "D." "E"—let me see. The first is orange. The third one here we always kept Coca-Cola in very nearly all the time; if it run out you understand only now at times, we will say there was Coca-Cola in "C" and if we run out of Dope we would put Coca-Cola in this one. We would have two Coca-Colas there if we run out of the other, because in drawing out it will happen nine times out of ten if your syrup runs out as it does when a crowd is at the fountain. If we run out of one, we put the other in that container. We would put the other in that container. That is the container C and D. I had Coca-Cola in there twice. That was no stable arrangement; if I would run out of Dope, I would have Coca-Cola in these two or run over there into the second and third. I could not tell how long this arrangement was, because we used to keep Coca-Cola here away back here somewhere, when we had a full line of drinks. We put it in there ever since we have been in business, the first has been used as orange, the second, third and fourth have been used for Dope and Coca-Cola. At different times we would have different things in each one.

(Deposition of C. J. Thornton.)

Part of the time "C" was labeled something, part of the time it was not labeled. Sometimes "C" was plain label that I had turned over, and sometimes it had Coca-Cola on it; I did not have a Dope label; there was [1319] two Coca-Cola labels, one was turned over, sometimes, it was on "D" and sometimes it was on "C." I can explain that to you now. If you run out—say if you have Dope and Coca-Cola and you run out of Dope, you fill up this one with Coca-Cola. You have two Coca-Cola's there, we will say, the barrel of Dope comes in, this one over here that has Coca-Cola in it, it runs out. We draw a gallon of Dope and put in there and push the plunger down in the drink and then they would have to put the plain one over there. If we had Coca-Cola in both, or if we had Dope in both, we will say we have Coca-Cola in the two. We would take out, as you run out of this, the plain one out and set it over here. It was always labeled Coca-Cola. That was my instructions, I have done it myself time and time again. I could not say whether it was done, that was my instructions to the men, to everyone there, we had a plain and a Coca-Cola. The plain one was for Dope. My instructions were to change the pumps, I know when I moved them. The change would not be very often, I do not suppose they run out more than two or three times a year, that there would be a necessity for any change. I always had sufficient Coca-Cola on hand for the people that called for it. I hardly ever run out because I could get it from Mr. Crow and I could get it from the Century Drug Store

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and from the Owl Drug Store any time I wanted it until a man came around and said I would be unable to obtain it except by barrels, that is the Coca-Cola representative. I do not know his name, he was a very nice fellow. I could not tell how much Coca-Cola I did buy in 1914. I did not keep any books, I could not tell you how much Dope I did buy. I can get that from the Dope people, the different people, I can get it. I can get it from the Koke people and can get it from the Luck-Ola and Tru-Cola people. I got several gallons of Coca-Cola from the Century Drug Company, I got several gallons from the Owl Drug Store in 1914. That was here, Hattiesburg, Mississippi. I got several gallons from the Coca-Cola Company in 1914—wait a minute—I believe Mr. Crow had quit selling me and when I went over he would not let me have any. I bought from Mr. Crow in 1913. I could not tell you how much, I bought it from him regularly. I think the most I ever got from him was 5 gallons at a time. I got it in a demijohn. **[1320]** I would generally use a 5-gallon demijohn of it and after I used 5 gallons of it, and I would use 5 gallons of Dope and I have used as many as two barrels of Dope to five gallons of Coca-Cola because—I have kept count of it at one time there, awhile, there would be about 20 to 25 calls for Dope and one call for Coca-Cola. I started this business with the Corner Drug Store in 1911. It was in business before but I was not connected with it. The product Dope from New Orleans comes to me in barrels, 50 gallon barrels. I do not know how

it was labeled, I never paid any attention to the labels. I do not know whether it was labeled or not. I said approximately 90 per cent of our customers called for Dope and in response to those calls I would serve him Luck-Ola, Tru-Cola, Dope and Coca-Cola. I have served lots of that. When a customer asked me for a Coca-Cola during the times that I was out of Coca-Cola I told him I did not have it. That was the instructions I told them, and told them because I was always looking for a pimp to come around. When they asked for a Coca-Cola I told them I did not have Coca-Cola. I always told them that. It has always been customary anywhere, when you asked for a Dope, you got a cola drink. If they came in and ask for Dope and I did not have Dope made by the Southern Koke Company I would give Coca-Cola. Customers using the term Dope or Koke, anybody knows they wanted a cola drink. Because I had good common sense, and a man with one-third or half sense would know that, when a man asks for a Dope if he has sense enough he knows he wants a cola drink. If they wanted a particular drink they would ask for it. Whenever a man come in and was particular enough to ask for a Coca-Cola we were always particular enough to give what he asked for. When a party comes in and asks for a Dope they want a cola drink, that is what I know. I know from being around the soda-fountain, putting it out, and I know if they come in and ask for a Dope and I give them a lemon soda they would throw it in my face, the particular ones, and the ones that want

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Coca-Cola ask for it. How would I know that they wanted a Coca-Cola drink when they asked for a Dope. How do I know they want a Coca-Cola when they ask for Coca-Cola, I give them all credit for having sense enough to know what they want. I think when he asks for a Dope that he wants a cola drink, I never go into the details. There are a few people in town, regular customers who [1321] walk in and say, "I want a Coca-Cola," you can pretty nearly always tell when they want a Coca-Cola. That is so. At one time the Coca-Cola people come in here with some pimps, and got around on the street kinder circulating around, you know, about poison, that some of the drug-stores here were selling stuff that was poison for Coca-Cola and they went so far as to advertise, the Coca-Cola Company has, on the different places, to ask for Coca-Cola by name, and that went along so when the street-car boys, I noticed would come in and ask for Coca-Cola. They would ask for Coca-Cola, they got it, people that had been asking for Dope got it, asked for Coca-Cola. They run it up here one week where we would use usually a gallon of Coca-Cola every other day, where we had been using a gallon a week sometimes. The Coca-Cola people advertise, ask for it in its own name. They do that they said to avoid substitutes. It went pretty hard and we had to pay a dollar and a half a gallon for that when they said ask for it by name to avoid substitution, for a man to ask for it. I do not remember they said not to use nicknames. I think they had one on at the picture show

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down there. Coca-Cola costs a dollar and a half, Koke a dollar a gallon. I handled them because it was better, is a better stuff and gives better satisfaction. There was more profit in it. We got the same price over the fountain. I handled the Dope because I like it better and because it gives better satisfaction than Coca-Cola at a less cost. I said I liked it better than Coca-Cola, it gives satisfaction. I base my better satisfaction when you take it up and drink the whole thing down and say, it is a good drink. I do not suppose any customers knew what they were getting. I have given Coca-Cola and they said it was not as good. Lots of those customers knew when they asked for Dope whether they were getting Coca-Cola or not. I told some of them what they got. It was the best cola drink I ever sold, I had more comments on it, was Luck-Ola, I had more comments about this is good Dope. I could not name anybody particular customers that knew, because when I was handling Luck-Ola as a Dope I had a contract with the Luck-Ola people for Mississippi, Louisiana and Texas, and it was generally known what ones—for drug-stores have a bunch of regular customers, you might say loafers who stay around and they all knew I sold Luck-Ola. There was one, G. Bufkin, he wanted to sell it, he came in one day and he drank it and he said, this is the best Dope I ever drank. He said, what is it? I said [1322] Luck-Ola. I expect that was in 1912 or 1913. There were several of them and I just remember him because when he drank it he wanted to sell it, and another fellow, Groff,

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and the young fellow by the name of Bridges used to work in a drug-store. I asked him to sell it and they did sell it and recommended it. I was not in attendance always at my fountain. I worked in reaching distance all the time. I was there 4 years, I think 4 years in there, 1911. I stayed there pretty close. My dispensers could have at various times sold some of these other products, Dope, Koke, and Konut, and other things for Coca-Cola by acting against instructions. My instructions were to sell Coca-Cola if they ask for it. That was all of my instructions relative to Dope and Coca-Cola. I told them time and again since this talk you know, I do not know whether they had brought suit against people, they were always talking about it, about substituting, etc., and I instructed them if people asked for Coca-Cola to give them Coca-Cola, and if they asked for Dope you can give them anything you have because when you ask for Dope that means a cola drink. If you want to go to assumptions, I just assumed if they wanted Coca-Cola they would ask for it; if they called for Dope they wanted a cola drink. The Coca-Cola people have always been threatening ever since I have been in the drug business, I have had a soda-fountain, take the Coca-Cola people, they would come around a soda-fountain and if—after they began to roll people around for substituting they would tell you if you were substituting, they would tell you you were substituting when they came in and ask for Koke, when a man comes in to you and asks for a Dope they want Coca-Cola, we claim that

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word, we know what they want. I instruct the dispensers if they call for Coca-Cola to give Coca-Cola and if they call for Dope give anything they had. I give that instructions because I did not want to be prosecuted and put out of business. I have always been threatened with suits. If a man asks for Coca-Cola it is against the law to sell him anything else. I could serve the customer with a glass of these other drinks and as a general proposition he would not be able to tell, they all taste practically the same and all look the same. I expect there would be some people who would be able to tell the difference. If it has been done it has been done against my instructions. The last representative of the Coca-Cola Company that called **[1323]** (Mr. H. B. Pierce was examining the witness at this point) was here either April or May, I was trying to get it, it was a little thin fellow, it was a short fellow that would weigh about 140 pounds, he was here in April. He was here before, went through and come back through several times. I do not know the name, the fellow introduced himself, but I cannot remember the name at all, I am satisfied it is not you. He had about 3 fellows with him, there was 3 come in and there at one time and asked for Coca-Cola and I laughed at them and they went out, along in April, I believe. I moved over there the first of April and I know we had been there almost a month when that fellow came in, it was in the morning. I certainly did not make a statement at that time and admit to Mr. Peace that it was true that I was substituting other

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drinks for and as Coca-Cola. I told him I did not have to lie. I did not say that I was now doing no more selling of imitations for Coca-Cola, not a word of truth in it, nor did I further state to him that I had bought no Coca-Cola syrup for over a year. He asked me what I handled outside of Coca-Cola. I had bought a 50-gallon barrel of the product of the Southern Koke Company. I did not say that I was using about 2 barrels of it a month during the summer, not that much. I stated to Mr. Peace that if the Coca-Cola Company wanted to they could proceed against me in any manner they wanted to. On March 30, 1913, and November 3, 1913, I was in charge of the Corner Drug Store. On that date I never drew syrup from the same container in our fountain in response to calls for Coca-Cola, Dope and Koke. If it was done I do not remember. I would be surprised to know it could be done. Oh, yes, because they are close together, those nicknames could have happened. I do not know as they may have happened. The same condition could be true from the time I started until the time I quit, that would cover all of it. It could not be even possible for you to draw that, a man with a bunch up in front, it is possible that a man would ask for one, one say, give me a Dope, another Coca-Cola and another Koke. Mr. Peace did not come to me and directly state to me and show me all his records where there had been sold in our store at various and divers times a product other than Coca-Cola when Coca-Cola was distinctly asked for. He did not state to me at the time

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that if I did not stop selling these other products as and for Coca-Cola when [1324] Coca-Cola was asked for that suits would possibly be brought against me. He came in there and he says that "You are selling a substitute for Coca-Cola. Now, we have got you dead-to-right. Unless you quit it and sign this contract to handle nothing but Coca-Cola made by the Atlanta people,"—and he had the contract there, and I looked over it once—you have seen that contract, like the rest of them—all but Mr. Williams,—he said, "We are going to bring action against you," and he said, "It could be criminal as well as a civil action." I said, "You are wrong." I said, "I have always sold Coca-Cola when Coca-Cola was asked for, and that is the general instructions. You can go in there and try to fool them." "Well," he said, "We got them the other day," and he says, "You served me Dope when I asked for a Coca-Cola." I said, "No, I did not serve you a dope when you asked for a Coca-Cola." He said, "Well, it come out of the dope container." I says, "The fact of it is I had Coca-Cola in both containers because I was out of Dope. You can go back there and see." I said, "I know who came in here with you. I remember the time because when you asked I invariably give Dope when they ask for Dope and Coca-Cola when they ask for Coca-Cola, but if we have not got the dope and they ask for Dope or Koke we give them Coca-Cola." And I said, "there it was in both pumps." "Well," he says, "You are going to have to quit handling it, anything but Coca-Cola. We are

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going to make you do it." He said, "We have got the money to do it and" he said, "You know money will do it." I said, "Money won't make me do anything." I said, "I expect to handle this stuff, the other, just as long as I can buy it for a dollar a gallon and it gives entire satisfaction." I said, "I do not propose to pull up when your stuff is not a bit better, under the conditions they are I do not propose to help build up a fund to buy a rope to hang me with." He said, "You had better do it." He said, "We will bring action against you. We are going to do it. We have got the dope on you all right." I said, "You may have but if it has ever been sold out there as a substitute I know it is wrong," and, I said, "It is not the instructions." And I said, "Possibly you may have come in here at one time and might have got Dope when you asked for Coca-Cola." I said, "You might have done it and," I said, "You cannot catch them boys in there, but they may have happened to make a mistake when a crowd is there, but my instructions are to sell Coca-Cola when Coca-Cola is asked for and when dope is asked for to sell a cola drink." **[1325]** He did not show me any data or records of times when he had purchased samples at my fountain; he never showed me anything, just showed the contract. He never told me that samples had been purchased at our fountain as and for Coca-Cola, and that they had been analyzed and found not to be Coca-Cola. No records were shown me of that kind, he did show me a contract in his hand and he asked me, and said, "Well, you are

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pretty frank." He said "Will you write just exactly what you have stated to me in a letter—write me a letter and address it to the hotel? We can get along." He had a contract he wanted me to sign to quit and he said, "We have got you dead-to-right." I do not know whether it was printed. I read it, the whole substance of it was to handle Coca-Cola and not to handle any other similar cola drink. He wanted me to admit in there that I had been substituting. In a general way it was just to admit that I had been substituting other drinks for Coca-Cola, and that I would not handle any of these other cola drinks other than Coca-Cola made by the Atlanta people, and that if I would do that there would be no prosecution unless I did do that that I would be—first there would be a civil suit for damages, etc., and probably a criminal prosecution. That agreement contained I was not to handle any others, I am sure of that, that I was not to handle any other cola syrups but the Coca-Cola. The suit was brought against me by the Coca-Cola Company. I have heard there was a preliminary injunction rendered against me by the Court, I saw it in the paper, that is what the United States Marshal served, you mean, was that a preliminary injunction. (Preliminary injunction against the Corner Drug Store.) I have seen it before. That is a temporary injunction, that was changed some before I could sell anything, it was modified because I could not sell anything under the original injunction of the same color.

Mr. PIERCE.—That will be Exhibit #44 and we

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desire to introduce as Exhibit #45, a certified copy of the final decree in the case. We also tender this diagram of the fountain as Exhibit #46 to the testimony of Mr. Thornton.

The Southern Koke Company, Limited, employed counsel to defend this suit against the Corner Drug Store by the Coca-Cola people, Mr. Hannah was employed by them to defend that suit. [1326]

Redirect Examination.

This Dr. Pepper is a soda-fountain beverage. I mean by Coca-Cola pimps, people that try to catch you serving other than Coca-Cola when Coca-Cola is asked for, detectives, that they have all around shadowing the trade in that way. This Coca-Cola representative Pierce or Peace or whatever his name was when he came to me last April or May, he said Dope was poison. This Dope made by the Southern Koke Company, Limited, was poison, poisonous substitutes. This man Peace told me that he was out of the law firm of Thompson, Candler and Hirsch. This paper (Defendants' Exhibit 227) is substantially a copy of the contract which this Coca-Cola representative wanted me to sign, that is the whole substance of it, of the whole contract that he showed me, and wanted me to sign. This paper, marked Complainant's Exhibit #43, being a copy of the preliminary injunction issued in the case of Coca-Cola Company vs. J. T. Mason and Gergiaha Mason, doing business as Corner Drug Store, that injunction was presented without a hearing from the defendants' attorneys just on the allegations of the bill,

(Deposition of C. J. Thornton.)

that is, I was told that it was. This paper was served on me along with the summons. I did not have any notice of the suit being filed before this paper was served on me. This paper marked Complainant's Exhibit #45, purporting to be a final decree in that same case, neither I or the Corner Drug Store was present at the time the decree was taken or knew that the case was coming up for trial at that time, at the time that the decree was put down. There was none of them present, or knew anything about it outside of—that is unless Mr. Hannah was there, the attorney. I did not have any notice that the case was coming up for trial at that time. It was just a default decree that was taken. That was just a snap judgment taken down there without notice to me that the case was coming up for trial. This preliminary injunction marked Complainant's Exhibit #43 was modified so as to enable us to sell other drinks of the same color. The original injunction, as originally written would even prevent me from selling root beer, or sarsaparilla, from selling anything of identical or similar color. Sarsaparilla and root beer are of similar color and lots of things are similar color; creme soda is the same color. [1327]

Recross-examination.

That modified order was an agreed order, that is what Mr. Hannah told me. I never saw a copy of it. He said that the decree, he and Cook agreed to strike out the—in that injunction where it says similar, identical or any other beverage, I believe was

(Deposition of C. J. Thornton.)

the way it read, any other beverage with similar or identical or similar color, something to that effect.

Mr. COOK.—It will save time by introducing that copy, to show what the agreement was. We will offer in evidence the copy of the modified agreement. Opposing counsel offer no objection to the carbon copy, do they?

Mr. LITTLETON.—No, sir.

I did not go to the federal court on the day it convened in Biloxi, the last session. I was not present on the day this final decree was entered. I do not know who actually appeared, personally. I do not know what proceedings were actually had on the day this final decree was rendered. I was not there. I first learned that the final decree had been rendered right to-day. I did not see a notice of it in the newspaper, not the final decree, the newspaper stated that the injunction—I do not know the exact words, but anyway the substance of the newspaper report was that they granted an injunction and damages or something else. The question of damages being left open. I think it was to be left open for a future suit, provided the Coca-Cola Company cared to prosecute further. I saw the newspaper report the day after; that was about the third day of the federal court, I reckon.

Mr. LITTLETON.—Q. Mr. Thornton, you are contemplating are you not, not to take proceedings to have that default judgment satisfied?

A. Yes, sir.

(Deposition of C. J. Thornton.)

Mr. COOK—(Continuing). What action do you contemplate to take?

A. I leave that to the attorney, Mr. Hannah. Mr. Mayfield employed Mr. Hannah. Mr. Mayfield is manager, I suppose, or the owner of the Southern Koke Company, Limited, at New Orleans. He said that he would help us through on it. That is the time that he employed—he came down and I told him I had no money to fight the case. That was when the suit was first instituted. I have not conferred with him since that time in regard to the suit. I had my conference with reference to attempting to set aside the decree with Mr. Hannah, just met him on the street down there and he said I did not understand [1328] it; he said it cannot amount to anything because we have not had any notice and the only deposition, I believe he said the depositions of the Coca-Cola side have been taken, but we have not taken our depositions yet and we are not ready for trial and never had some agreement or notice of this, and I told him the other month,—I said, "What can we do?" He said, "We will have to have it reopened. I do not know whether the federal court is in session down there or not. I do not know that was what happened." Someone called my attention to the Coca-Cola case and I got a paper and looked at it and saw how it was.

Redirect Examination.

You told me you would take the matter up with Messrs. Stephens & Cook about having the order set

(Deposition of C. J. Thornton.)

aside. I do not know what conversations you have had with them. Mr. Mayfield employed you (referring to Littleton) through me.

Recross-examination.

I guess I will have to pay the fee in the long run. I told him I would pay it. I am going to pay Mr. Mayfield. He advanced, he asked me when he came back, I do not know how much the fee was, he said when he came back in and talked to me and I told him to employ Mr. Hannah, and he went down there then and I went down there with him and when he come back, Mr. Mayfield, come back, just about dark, and he said, "You will have to start Mr. Hannah off to work by giving him a little check." I said, "I have not got it, Mr. Mayfield." "Well," he said, "I will send one to-morrow. I will send it to you and you can carry it to him," and he sent the check to me and I carried it to Mr. Hannah. I have not been out any money in the employment of Mr. Hannah. I have made, you might say, temporary arrangements, to go to work for Mr. Mayfield and pay him what I owe him. I do not know how much I owe him. I told him, here about a week ago, that I did not have any money, but I would pay it as soon as I could. I said, "If you have any opening anywhere to go to work I will work it out." "Well," he says, "I have a place in Little Rock I can put you to work." I do not know how much I owe him. In addition to Mr. Hannah's I owe him for some Dope

(Deposition of C. J. Thornton.)

and I owe Mr. Hannah for whatever [1329] it is, I do not know what that is yet, he said he did not. I agreed to work it all out.

Deposition of A. S. Goody for Defendants.

A. S. GOODY.

Direct Examination.

Age, thirty-one. Live at Lucedale, Mississippi. I am the mayor of that town. Aside from being mayor I am engaged in a drug-store at Lucedale, Mississippi. The name of my drug-store is Lucedale Drug Company. I have a soda-fountain in my drug-store. I dispense Dope and Coca-Cola. This Dope is bought from New Orleans, the product of the Southern Koke Company, Limited. I consider the word Dope means anything in that line, of Coca-Cola or cola beverages, like Konut, Afri-Cola, Gay-Ola, any of those cola drinks, rather an indefinite term, it does not mean any specific one, no specific brand of cola drinks. I had a call on me by a representative of the Coca-Cola Company sometime in September, 1914. He came in the store and the first I knew of it, he came back in the office, but he came in the store and asked for Coca-Cola, and the soda dispenser gave it to him, and he tasted of it and told him, he said that is not Coca-Cola, and the young man told him it was, and he asked for the manager and he pointed me out to him, and he came back and asked me why we were selling a substitute for Coca-Cola. I told him we were not doing it. He said, "I just bought one, asked for Coca-Cola and

(Deposition of A. S. Goody.)

he did not give it to me." I called the soda dispenser back and asked him and he said that he did. That was our instructions to him that he should serve Coca-Cola. We keep the two syrups in there, in separate jars. One has Coca-Cola and the other has banana on it, on the label. He said, "I served him the drink out of the jar labeled Coca-Cola." My nephew was visiting me at the time and he pointed out, standing before the soda-fountain at the time, just pointed to me and told me the motion that this was served out of the jar labeled Coca-Cola, and the traveling man pointed out and told me that he got it out of that jar and it was the one that we keep Coca-Cola in. And he then asked if I did not think it was unjust and unfair for us to sell it. I told him no. He asked me then if I did not know when a man called for a Dope that he meant Coca-Cola. I told him I did not, that I was not any mind-reader, and I did not have any [1330] better sense than to give a man what he called for. I could not tel' you exactly the words we used, but we had quite an interview, and the substance of his contention was that we ought to sell Coca-Cola no matter what they asked for, and I told him I thought if he asked for Dope I had a right to serve him Dope, and if he asked for Coca-Cola I always served Coca-Cola, just like they ask for, and he then told us, did not tell us right out, but he intimated, or rather, indicated to me that they were going to enter suit against us if we did not quit handling this other beverage. He

(Deposition of A. S. Goody.)

wanted us to handle Coca-Cola exclusively, serve it on all calls. He did not offer to sell anything or ask to sign any contract or anything, in fact his manner was very peremptory all the way through the whole conversation in discussing it, and the question came up as to the quality of the two, and I told that I had served my customers with these drinks set side by side, that is, Coca-Cola and Koke, and asked them to taste them and see what the difference was between the products, and they all preferred Koke if anyone had any expressed preference for Coca-Cola. I think it is a better drink. I use the two and the other weighs a pound more to the gallon and I do not see anything wrong with it. He said, "It is not a better preparation." I said, "My customers like it better." He said they did not do that. I said, "If you go to disputing my word, that ends it. I am not going to dispute with anybody; this is my place of business and you get out," and he started out and turned around and came back and told me, "Don't you dare to sell any other—another drink of that stuff on calls for Coca-Cola." I told him that was gratuitous because I am not doing that anyway. I never have and I am not starting it this late in my life. That ended the interview. I do not know that I told you all that happened but that is about the substance of the interview and that is about the only time they ever called on us in that kind of a way. The Coca-Cola syrup is not always uniform. I could not tell you the difference exactly

(Deposition of A. S. Goody.)

but some barrels seem to be a thinner syrup than others. Possibly a lighter color and it has a little variation in taste and sometimes the latter part of it, that is, when you buy a barrel and use it, that the part that is used last will taste different from that that you **[1331]** first drew out. And that when you drew out first is odored or something like sassafras, and I have on one occasion that I knew of, that I drew out a small bottle of this, I think a half-pint bottle of it, and kept it excluded from the light and when we got to the bottom I compared the two and there was a difference in taste, not very much difference. I suppose that it is some oil or ingredient in it that exposure to the light will change. The thickness or weight of the syrup varies, that is what is known as specific gravity of it. I never had to send any Coca-Cola back to the Coca-Cola Company. I did not send it back, but about the time we started using this Dope I got a barrel of Coca-Cola. I think it was the worst barrel I ever had from the company. We had two come and it was brown, lighter than the other. I wrote the Coca-Cola Company about it and told them, I thought there was a mistake about it it was not satisfactory, and they wrote back and asked for a sample, and I sent some, and they wrote in reply that they had examined it, tested it, and it was like they had sold since they had been in business and it was all right and they refused to make any adjustment whatever. After this call from the Coca-Cola representative I wrote

(Deposition of A. S. Goody.)

a letter to the Southern Koke Company, Limited, with reference to the matter. Defendants' Exhibit #228 is the letter I wrote to the Southern Koke Company right after that occurrence.

Mr. LITTLETON.—You can ask him. I now tender and offer in evidence Defendants' Exhibit #228, being a letter from the Lucedale Drug Company addressed to the Southern Koke Company, New Orleans, as evidence on behalf of the defendants in the above-styled causes.

Cross-examination.

I have been in the drug business about ten years. I have been handling the product of the Southern Koke Company, Limited, about two years. I handled prior to that time Coca-Cola exclusively. I had calls at my fountain prior to the time that I handled the product of the Southern Koke Company for Dope or Koke. Just a minute; I did handle one barrel in my experience of Gay-Ola, that is within the other eight years prior to this last two. That was not named Dope. With the exception of that one barrel I handled Coca-Cola exclusively. I give Coca-Cola on calls for Dope and Koke. I did not [1332] understand it. I do not know how I understood it. I did not pay particular attention to it. I just knew they wanted something that satisfied them and answered for it all right, and there was no objection raised. It was the only kind I had. When did you first change your mind about that?

Mr. LITTLETON.—We object to that kind of question.

(Deposition of A. S. Goody.)

Object overruled and appeal prayed and granted.

I have not exactly changed my mind about it. I put in this product called Dope by the Southern Koke Company, Limited, about two years ago. I do not know the exact date. This product cost me one dollar twenty-five a gallon, with a twenty-five cents a gallon rebate if you pay it within thirty days. Coca-Cola cost one dollar fifty, a rebate of five per cent, I believe, if you buy one hundred gallons and more for larger quantities. We have a Puffer soda fountain, that is porcelain jars. We keep one in one jar and one in another. Those jars are labeled. The jar that I keep the product of the Southern Koke Company I think is labeled Dope and Koke. The jar that I keep the Coca-Cola in is Coca-Cola. I am familiar with our fountain. The draft arm called "A," to the left the first container "B" is Coca-Cola," "C" is vanilla, "D" I do not remember, "E" is not used, "F" is Dope, "G" is lemon, "H" is orange, in "I"—the position of those, they are not in use all the year and I do not remember what they are. "B" is labeled Coca-Cola. I keep Dope in the container "F," and it is labeled Dope or Koke. I am not in charge of the fountain all the time. I cannot say what goes on there all the time. I do not know whether my dispensers at any time serve one drink for the other. I watch for that as well as I can and they tell me they do not do that and they are given positive instructions to serve what is called for. My instructions in that connection is if

(Deposition of A. S. Goody.)

a man comes in and calls for Dope, give Dope; and if he comes and calls for Coca-Cola, give Coca-Cola. I do not know anything about what he wants. I give him what he asks for. I give him the one made by the Southern Koke Company, that is the cheaper product of the two. I make more profit on it, it costs us less money. It is not why I do it. I do it because it is what they ask for. I do not know what they want. I give them what they ask for. I do it. I just want to make it **[1333]** clear to you that I would do that if that were the higher priced product. I will say this, that I have some customers who tell me that they want Coca-Cola, and in fact I can name two, Mr. Boling and Mr. Johnson. They frequently call for a Dope and we always give them Coca-Cola. The dispensers know them and know what they want and always give Coca-Cola. When customers ask for Koke I give them Dope, sometimes I might get it mixed up and give Coca-Cola. Dope and Koke, the Southern Koke Company claim in their letters and advertising, they state that the two products are the same. One product with two names is the impression I have. I do not know about that. When a man comes in and asks for a Koke I give the product of the Southern Koke Company. I suppose when they ask for Dope I give Dope, and when they ask for Coca-Cola I give Coca-Cola, and when they ask a usual thing I think we give Dope. Prior to handling the product of the Southern Koke Company, about two years, with the exception of one

(Deposition of A. S. Goody.)

barrel of Gay-Ola eight years prior to that, people who asked for Dope and Koke at our fountain were served Coca-Cola. I do not know what the people want when they ask for Dope or Koke. I serve the product of the Southern Koke Company. That is cheaper than Coca-Cola.

Redirect Examination.

Well, when I started handling it,—I will make a full statement to make my position clear on it,—I have no interest whatever in either one of the companies. I do not care any more for one than for the other. I do not know any of them, and have no interest in any, but a good many of my customers would come in and ask for Dope, and talking over the matter about the advertising, the wide advertising, and things of that kind, they would say, "Why don't you handle Konut, and get some Dope?" I got some of it in Mobile—in Hattiesburg, and I like it better than I do Coca-Cola. I never did pay any particular attention to it until Mr. Patton, I think was the man, that came around and got me to put in a barrel to try it, and explained to us that we would sell it without violating any law on calls for Dope. I got some of it, sent to us on trial, subject to our approval. I think the terms that it is sold on—I would not swear, though, but it came in that way. When it first came in I explained that one was made in New Orleans, one in Atlanta, two different concerns, and supposed to be different products altogether, [1334] and asked them which they liked

(Deposition of A. S. Goody.)

best, at the expense of the store I would make up the two drinks, and nearly all of them preferred the Dope to the Coca-Cola. I always made it a rule to get that matter fairly. I will state we buy the Coca-Cola from the Central Drug Store in Lucedale because we do not handle enough to justify us in buying in barrel lots, and I made an agreement to buy from them and save us from having to carry two full barrels in stock at the same time. It sometimes happened that we would get out of Coca-Cola entirely and I always instructed the dispensers to instruct the customer, tell the customer we have not got Coca-Cola. This traveling man came in and asked for Coca-Cola. I told him I did not have it. He said, "Well, have you got Dope?" I said, "Yes." He then remarked that "You are an honest man." When a customer comes into my fountain and asks for Dope or Koke, and I serve him this New Orleans product, I consider I am giving him what he asked for. I never had a customer refuse or decline a Koke or Dope, the New Orleans product, on the ground it was not what he asked for as Koke or Dope.

Recross-examination.

I do not remember the name of the Coca-Cola representative that called on me. He does not call on me regularly. It was August or September, 1914. When Mr. Patton of the Southern Koke Company called on me at the time I first took up the question of purchasing the product of the Southern Koke Company, there was no comparison made at that

(Deposition of A. S. Goody.)

time between his product and Coca-Cola. Nothing was said about Coca-Cola at all at that time. He simply told me that he had a drink, that he had a drink that was selling under the name of Dope and Koke, and he said you have calls for it, and I told him what I had been serving there and he said he thought we ought to sell this other—well, their other produce on those calls. I do not remember the reason, that happened a good while ago. I simply made up a drink from Coca-Cola syrup and another drink from Dope syrup and gave the two out and asked the customer which he liked the best. I did not tell the customer which it was until after he had made the test. The customer was not in any position to know what he was drinking. I done this, in making these comparisons when they come in and called for a drink, and I have just simply for my own [1335] benefit, as I wanted to find out which was the better of the two, to see whether he could tell any difference between the two. As a rule, they could tell, they generally expressed the preference as to which they liked. Not always would they say the product of the Southern Koke Company, but usually. When people come into our fountain and ask for Dope and I serve the product of the Southern Koke Company, the soda-fountain is right open and they can see where I get it, they can see what it is labeled. They would have no means of knowing except my word and reputation of the firm. I do not tell my regular customers what they were getting, they all know we

(Deposition of A. S. Goody.)

are handling the two products. Well, I mentioned two, P. P. Bailey, C. D. Johnson, C. D. Hinson, T. T. Tyree, M. M. Griffin, H. Dickens, M. M. Hammon, G. S. Dickens, W. J. Smith; is that enough, I could get you a list. I just give you the ones right around there. Some of those I have given you are some I know prefer Coca-Cola and some prefer Dope, and always come in and insist on having Dope. All of them know it, practically, and I think everyone of them know we are handling two products and that they have to ask for one or the other, whichever one they want. They clearly understand that we have two products made by two different concerns and will get what they ask for.

Deposition of J. E. Jones, for Defendants.

J. E. JONES.

Direct Examination.

My age is forty; engaged in retail drug-business here at Hattiesburg, Mississippi. The name of my drug-store is the Yellow Pine Pharmacy. I have a soda-fountain in connection with my store, have had a soda-fountain nine years. I have dispensed Coca-Cola made by the Coca-Cola Company, and Konut by Hagan & Dodd and made in Atlanta. When customers came in and asked for these cola products, the average run of customers ask for Dope or Koke, Dope usually. I served Konut when I handled it. I have handled it not quite two years. When customers came in and asked for a Dope and I served them with a Konut I considered that I gave

(Deposition of J. E. Jones.)

them what they asked for at that time. Of course, I think it was within my rights in handling Konut. I cannot remember that we ever had a customer to refuse Konut when served to him on requests for Dope or Koke. It seems that I would have known it, not being my **[1336]** own dispenser, unless it came back to me but I never know of it. I am not about the fountain myself so very much. Some time ago I had a call from a representative of the Coca-Cola Company with reference to my handling this product Konut. I had a call from him, I had quite a few conversations with a Mr. Watson about my selling it. I believe Mr. Watson is his name. He used to be salesman through this territory. I had another conversation with a representative of the Coca-Cola Company, a Mr. Pierce, this Mr. Pierce sitting over here. Mr. Pierce came and told me that I was substituting and infringing on their rights and I would have to stop it. He told me that he was Mr. Pierce, represented the legal department of the Coca-Cola Company. He told me that I would have to quit selling Konut, that they would sue me if I did not stop it. The Coca-Cola Company would sue me. A contract was presented to me to be signed. I do not remember that I have a copy of the contract. I do not know that it was a contract, I have one of their regular contracts, I signed one of those, that is a customer's contract. I signed that with the jobber. I do not know whether I signed it with the jobber later or give it to Mr. Pierce. I do not remember, I expect I must have given it to the

(Deposition of J. E. Jones.)

jobber. This contract Mr. Pierce wanted me to sign, was just an agreement not to sell—but practically an acknowledgment that we had been selling Konut, and would discontinue selling and sell Coca-Cola altogether, that we would handle Coca-Cola exclusively thereafter. That was my understanding. I told him I would consult my attorneys, I did that at his suggestion too, and just to get myself on safe ground on the subject and would consult with my attorney. I consulted with Mr. Cook there and his partner Mr. Stevens, Mr. Cook here, present, they were not representing the Coca-Cola, however, at that time. I consulted them. I do not know whether Mr. Pierce knew them at that time or not. I went there and saw them. I actually quit handling Konut altogether. I am now handling Coca-Cola exclusively. I quit handling Konut because Mr.—My attorneys advised me to quit it, that I would get in trouble if I did not quit handling it. I do not know that they went into any law in the matter, that I could clearly understand it, they took the matter under advisement, **[1337]** I was there in the forenoon and again in the afternoon, or it might have been the next day, I cannot remember now, right now, when finally they told me it—it may have been a day or two later, or that evening, it seems they did not tell me right away, they looked into the matter and told me I was on safe ground to quit it. I quit handling Konut because of those threats and the advice I had on the subject, of course. I felt at the time that I was handling

(Deposition of J. E. Jones.)

Konut that I was clearly in my rights. I did not think anything else. My attorneys just advised me that the question of substitution had not been exactly settled and it would be a safe proposition not to question the thing, not be lead into all kinds of litigation on the subject you know, that would not have been profitable for a small man like me to have been litigating with a big concern over such a proposition as that.

Cross-examination.

At that time that Koke and Dope and those terms were probably nicknames for Coca-Cola was the contention of Mr. Pierce at that time. Now, Mr. Cook, I do not know that I ever had that advice from you as an attorney, that that was exactly the facts of the case. You advised me, and understand I accepted it, I employed you and your advice was taken in the matter. You concluded that it amounted to a substitution even though my intention was perfectly good at the outset. I was advised by the attorneys that was their viewpoint of the contention exactly, that I was substituting. I had Coca-Cola at that time for sale. I had never been substituting Konut when people came in and called for Coca-Cola. It has never been done with my knowledge, and is positively against my instructions to do such a thing. If any of my dispensers did so, it was against my instructions for them to sell Konut if a man asked for Coca-Cola absolutely. A Coca-Cola representative wanted to go back to the

(Deposition of J. E. Jones.)

back of my store and examine my barrels and containers, he was a right young chap, seemed to be of age, I think his name was Jackson. Mr. Watson peeped in my back window according to his own statement. Mr. Watson said he was looking in at the back window, I think Mr. Watson said too that I had an empty Konut barrel on the sidewalk and he looked into the **[1338]** back window to see if I had any more. I quit handling Konut not because it is a substitution but because I wanted to avoid the threatened litigation. Of course I consulted my attorneys and they told me I was substituting and it would be safe to quit.

Recross-examination.

I have always instructed my dispensers relative to handling these drinks. I could not know whether my instructions were always carried out. I know it is like it is in various other instructions. Very often they are not carried out. It could have been possible that some of my dispensers at some time had sold some of this Konut for Coca-Cola. If it was done it was done positively against the instructions. I never knew of it to happen. I have been handling Konut, I think it had been pretty close to two years. I was in business nine years, prior to that time I handled Coca-Cola exclusively. When customers came to my fountain first prior to the time I handled Konut and made a request for a drink of Koke or Dope I serve them Coca-Cola. I never handled any other drink but Coca-Cola. At that time I understood they wanted that. Konut syrup costs a dollar

(Deposition of J. E. Jones.)

a gallon. Coca-Cola a dollar and a half. The difference in price is the reason I handled it. I could not remember how many barrels of Coca-Cola I purchased in 1913. I would have to go to get my files and tell you, I can do that mighty easy. I could not tell you how much Konut I bought in 1913 to save my soul. I can go to my books. I expect I have got that record in my books. I am sure I have my business in the ledger, both of them. I do not know that the terms Koke and Dope in Hattiesburg are nicknames for Coca-Cola. I cannot tell you yes or no. I have asked the public, some are positive and some say no, it is every man's personal opinion, it seems that is what I do not know. When a customer comes in and asks for a Dope or Koke I thought when I give him any cola drink I was in my rights. I did not know what the customer wanted in my mind. I just gave him the cola product I had, the cheaper product. Any man is in business for his profits.

Redirect Examination.

I have never considered when a customer came in and asked for a Dope or a Koke that he was making a definite and specific request on me for Coca-Cola **[1339]** exclusively at that time. Prior to the time I know of no other cola drink absolutely, other than Coca-Cola.

Deposition of J. R. Kelly, for Defendants.

Direct Examination.

Age forty-five; live in Ellesville, Mississippi. I am a bookkeeper, secretary and treasurer and bookkeeper for the Hyde Drug Company. We have a soda-fountain in our drug-store. We dispense the Southern Koke Company's Limited, Koke, this Dope and Koke, and Coca-Cola. I have been engaged in the drug business there two years and six months. I very seldom wait on the counter. I do not suppose I wait on one customer a day. I had a call on me, I do not remember exactly when it was, it was last summer sometime. I believe his name was Pierce. I am not positive that he is the man (indicating Mr. Pierce.)

Mr. PIERCE.—It is not so long ago, you ought to remember.

He told me he represented the Coca-Cola people. Well, he came in there, he had a contract of some kind that he wanted us to sign. I am not sure whether he had talked to Mr. Hyde before this or not. My office is at the back. He came in there and showed me a contract he wanted me to sign, or the Hyde Drug Company to sign to sell nothing else but Coca-Cola. He showed it to me. I read it over and I asked him, I said, "What do you mean by this contract?" He said, "Just what it says." I said, "Do you mean that we are to sell nothing in the world but Coca-Cola, if we sign this contract." He said, "Yes, sir." I said, "I will not sign it," and there were some words passed. I do not remember

(Deposition of J. R. Kelly.)

just exactly what it was but I asked him to let me see my attorney in the matter, which he said was all right, and I went out, I reckon for thirty minutes, something like that and I saw my attorney and he **[1340]** said he would not sign it. I came back and he said, "What are you going to do about that." I said, "I was not going to sign it." I asked him if he would give me a copy of it and he said he would not. He said if I was not going to sign it I had no further use with it. That I would hear from him later through his attorneys. Before he showed me the contract he said we were liable to indictment, and he was going to have us indicted unless we signed the contract to stop selling this other stuff, as a substitute for Coca-Cola. I knew very little about the law. I knew we were buying and selling at the fountain because I was buying for it and knew we were handling both. Neither the Hyde Drug Company or any of its dispensers had been substituting as far as I know. I had instructed the boys not to do it. He just took the contract and got on out and said we would hear from him later. I had a call on me by the attorney for the Coca-Cola Company, one morning not very long after that Mr. Divers came into my office and presented the same petition, or the same contract rather to me, I said, "Judge" I had known him a long time, I said, "Judge, you do not mean for me to sign that thing, do you," and we just laughed it off that way. "Now, yes." I said, "Well, now I refused to sign that thing for the representative of the Coca-Cola

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Company and under the instructions of my attorney, Captain Hardy. Suppose we just walk around and see Captain Hardy and see what he says about that." He said, "All right, we will do that." So, we went around to Captain Hardy's office and Captain Hardy said, "Divers, don't you know that that contract is absolutely no good? In other words," he said, "do you suppose I would let one of my clients sign that thing. Those people around do not sell a thing in the world only what their customers call for. I trade there all the time myself. If I want a dope I go there and get a dope. If I want a Coca-Cola I get it." He said, "Who is signing this thing?" Divers said, "I believe every drug-store in the state has signed it except about five or six." He said, "Divers, I will tell you what I will do. You tell me who those six are that have not signed it." Well, he said that he mentioned that fellow down here at Hattiesburg, I believe it was Williams—I am not sure—he said, "Well, we had better stop. You give me a list of those that have signed it and if there is not over six in the state who have not **[1341]** signed it, we will sign it, and it was a question of fact a talk of an hour. Then Captain Hardy said, "Now, Divers, we positively will not sign that thing but if you will draw up the right kind of an agreement we will sign it." Divers said, "What kind do you want, Captain?" He said, "One that has some reason in it." And we just stopped talking right there and Divers left. We have never heard any more of it. Judge Divers did

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not say anything to me with reference to a suit by the Coca-Cola Company against me if the contract was not signed, that was the other representative. Later I got a letter from the general counsel of the Coca-Cola Company with reference to this same matter. Defendants' Exhibit #229 is a correct copy of the letter I got, to the best of my recollection it is.

Mr. LITTLETON.—He has got the original letter in his safe at home and if it is agreeable I want to let him keep it and put the copy in place of the original.

Mr. PIERCE.—All right.

Later I wrote a letter with reference to that same matter to the Southern Koke Company, Limited, at New Orleans. Defendants' Exhibit marked #230 is the letter I wrote to the Southern Koke Company, Limited. Defendants' Exhibit #229 is the copy of the letter which I sent the Southern Koke Company, Limited, to the best of my recollection.

Mr. LITTLETON.—We now tender and offer in evidence the papers identified by the witness as the Defendants' Exhibit #229 and #230 as evidence on behalf of the defendant in the above-styled causes. It is stipulated and agreed that the copy of the letter Marked Defendants' Exhibit #229 may be filed in evidence instead of the original letter which has been misplaced.

Cross-examination.

Peace saw me last August; that was the gentleman's name to the best of my recollection. I do not remember about the initials. There may have been

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some other little things that come up. It was substantially as I have stated in reference to this contract and conversation. The purpose of Mr. Peace's call on me was to get us to sign a contract not to sell anything except Coca-Cola. We talked about a great many other things, but that seemed [1342] to be his object. He may have seen Mr. Hyde first. Mr. Hyde stays in front and he came back in the back. Perhaps Mr. Peace did tell me that his purpose for calling to see me was to get me to enter into an agreement or contract, that I would discontinue substituting any other product for and as Coca-Cola. Mr. Peace did not show me one or more reports or test that had been made at our fountain. Mr. Peace did not inform me at the time that some samples had been purchased as and for Coca-Cola out of our fountain, samples of syrup, and that they had been analyzed and found not to be Coca-Cola. He did not say anything like that to me. He did not approach me on that at all. I did not know of any investigation having been made at our store of that character, only what Mr. Hyde told me that his man told him. I am pretty familiar with what goes on at the fountain, but it is not my business to serve. I am familiar with the arrangement of our fountain where we keep these syrups. I am no draftsman. We have lemon, vanilla, Coca-Cola, pineapple and all of them but I do not know what particular containers in the fountain each one of those are kept. I can go and look at the label and tell. I never been a druggist in my life. I have been bookkeeper for

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two years and a half. Prior to that I was justice of the peace at Gulfport for twelve years. I was not connected in any manner with the soft drink business prior to my connection with the Hyde Drug Company, consequently I am not familiar with what went on before that in the business. We handle Coca-Cola at the Hyde Drug Company along with this other product I suppose I got a reply to this letter I wrote the Koke Company. I do not remember, I have got all the correspondence. The letter referred to as being "enclosed" in this letter is Exhibit #229. I am not sure I received a reply to this letter. I suppose that I got the information I asked for. I canot recall it. I have got my file at Ellesville in the safe.

Deposition of E. J. Williams, for Defendants.

E. J. WILLIAMS.

Direct Examination.

Age, thirty-one. Live Hattiesburg, Mississippi; engaged in drug business. I have a soda-fount in my drug store. The name of my drug store is Owl Drug Store. We dispense Dope, Koke, Konut and Coca-Cola. This Koke and Dope are from the Southern Koke Company. When customers come in and ask for Koke **[1343]** or Dope we give them Koke or Dope. If a customer comes into our drug-store and asks me for either a Koke or a Dope I do not consider that he has made a definite and specific demand on me for Coca-Cola exclusively. When he asks for a Koke or a Dope and I serve him this New

(Deposition of E. J. Williams.)

Orleans product I think I give him what he asked for. I have never had a customer reject the New Orleans product, Koke or Dope, when he asks for it as Koke or Dope, on the ground it was not what he asked for. I do not remember when it was, that is one of the salesmen of the Coca-Cola Company called on my brother there, and later there was a so-called attorney who called on me. This so called attorney, as well as I can remember was Pierce, that is the gentleman right there, Mr. H. B. Pierce. Mr. Pierce told me he was attorney for the Coca-Cola Company. He said he came there to see us about this substitution that they had been carrying on there, about bringing suit against the Owl Drug Store for substitution. I told him I had not been substituting any and he said we had, that he had the "Dope" on us, that he had sworn statements, et cetera. I asked to see them about us and he pulled out some stuff that he had gotten from some fellows, I do not remember who they were, that came in and claimed that one of these fellows came in and called for Coca-Cola, and got a six-ounce bottle of Coca-Cola and we sold Konut. The next fellow came in I believe and called for Konut—called for Coca-Cola and we sold Konut, and a fellow called for Konut, and I do not know what he said we served him, but anyway the fellow that come in and called for Konut got Konut. He did not get Coca-Cola. So he left a —I do not know what you would call it, he left something there to sign to avoid the suit, that is, if I would sign the paper that he give me there, there

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would be no suit against us. So I took a copy of it. Then I believe he came back down to the hotel, drew it up and brought it back up there and give it to me. I did not have time to read it and told him to come back later. He said he would come back later in the afternoon. He did and I had an attorney look at it during the time and he advised me not to sign it. I had studied it closely and I did not see why I should sign it. Defendants' Exhibit #227 [1344] is what I was asked to sign. In event I refused to sign that contract they were going to sue me here for that purpose. No one with my knowledge, consent, or acquiescence or connivance had been substituting Koke for Coca-Cola. If any of our dispensers had in fact sold Konut when customers asked for Coca-Cola I did not know of it. The manner of the attorney from the Coca-Cola Company, the way he approached me it did not appear to me calm and placid, that is one reason we sorter got mad from the upshot about the whole thing of it, the way he approached me. I had never been approached that way and accused of being a crook, *et cetera,* and so on. I was not easy about it. For what he said that is what I would think he meant, being dishonest about it. I did not sign the contract. That interview terminated very unpleasant to me and I guess to him too. Well, he came back in there in the night, after supper some time and I told him I was not going to—I do not remember everything that went on, but anyway I told him I was not going to sign the paper. He said, we will bring suit. One

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word brought on another and I asked him to get out of the store. I do not think he has been back in there since, either. A suit was subsequently brought against us by the Coca-Cola Company. That suit is now pending and undetermined. Mr. Pierce asked me where the contract was. I told him I had it in my safe and was going to keep it. I do not think he asked me for it.

Mr. LITTLETON.—I tender and offer in evidence as Defendants' Exhibit #227 the contract above referred to, to be used in evidence on behalf of the above-named defendants in the above-styled causes.

Mr. PIERCE.—Do you offer that here, they are not the same, this one is a copy, the one I wrote, I wrote in longhand and that one is not the same.

The WITNESS.—I have the original.

Mr. PIERCE.—Let's get it and if it is the same, why, put it in, but the copy at that time was written in longhand. I know a pretty bad hand, but substantially the one he got from me, was entirely different from that, no doubt it is.

Mr. LITTLETON.—With the reservation that if this is an exact copy of the original I want to tender this copy in evidence as Defendants' Exhibit #227 [1345] and with that understanding I tender and offer in evidence as Defendants' Exhibit #227, to be used in evidence on the trial of the above-entitled causes.

Mr. PIERCE.—And if Mr. Williams has the original I want to compare them before we leave;

(Deposition of E. J. Williams.)

Mr. Williams has the original.

Mr. LITTLETON.—Yes, sir.

Cross-examination.

I am a member of the firm of the Owl Drug Company. My father, F. E., is the other member of the firm. I think that firm has been operating about eight years here in Hattiesburg. I had been in the drug business before. I have handled soft drinks about six years. I first saw this Southern Koke Company preparation sometime last year. Prior to that time I had been using Konut. Hagan & Dodd manufacture the Konut, of Atlanta. I do not know how long we had been using that product. We have been using it for some time, for two or three years I suppose. I believe that is the first one we used, that is to amount to anything. We had used some others, I do not recall them. Some other cola drinks, we had used different ones of them. We did use Coca-Cola ever since we have been in business. When Koke and Dope were called for we served Konut, Koke and Dope. We have been doing it all along. I could not tell you when I first heard the expression Koke and Dope. I have been calling for it that way myself ever since I can remember drinking Coca-Cola. I do not know what I was calling for, I would walk up to a fountain and call for a Dope. I did not drink any when I was a small boy. I could not get it. When I called for Dope, I wanted a cola drink, I reckon you will call it. I could not tell when I first began to ask for Dope. I have heard people walk up to fountains and call for

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a Dope ever since I have been in a drug-store, Dope and Koke. I have been in the drug business six years; that is where there was a soda-fountain. I have been in the drug business where there was no soda-fountain. I could not tell you how long prior to that I had heard the word Dope, I guess ten years. Heard of the expression Koke about the same length of time; a great many people would call Koke or Dope; Dope means Koke. There was all kinds of cola products at that [1346] time on the market. I am not familiar with the names but about three or four, Konut, Koke and Dope and Afri-Cola are about all I know of. I could not tell you as they were on the market ten years ago. Ten years ago I was not in the drug business. I could not tell you what people want when they asked for Dope ten years ago or what they got. I do not know how I arrived at the use of the word Dope; I do not know what they sold when Dope was asked for. I do not know what I wanted when I asked for Dope back there in those times. I just called for a Dope. Sometimes I reckon I wanted Coca-Cola; that is, a great many people, I reckon, when they wanted Coca-Cola would call it Dope, Dope or Koke. I do not know as that is true to-day. I do not know what a man wants when he asks for a Dope, whether Coca-Cola or what when he calls for Dope or Koke. To-day, if a man would ask for a Dope I would give him Dope or Koke. I do that because I have it in stock, I give him what he calls for. I have Coca-Cola in stock. I would not refuse to give him Coca-Cola,

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and we do do it, I have seen the boys do it, I have done it myself. As a rule, we give Koke or Dope. It is to my interest to do it, that is about all, and I try to give him what he calls for. In the conversation that I had with Mr. Pierce I did not admit selling the imitation product for Coca-Cola at the soda fountain. I was selling Konut all the time and Koke, when Koke or Dope were called for. I did not state in that interview that I was using about four hundred gallons of Konut syrup a year. I do not know how many gallons of that Konut syrup we did use. I never did run it up, I think of Konut we sold, I reckon, four to six to six hundred gallons. I do not know that it increased any. Our sales of Coca-Cola decreased over that period when we were using Konut because we had not been handling anything but Coca-Cola. It decreased very materially in 1912 and '13. I do not remember of a one calling for Konut by its name. We sold Konut there in 1912 and '13, on orders for Koke and Dope. I did not admit to Mr. Pierce in that conversation that I thoroughly knew and understood when customers asked for Koke or Dope that they wanted and expected to receive Coca-Cola. I do not know whether they expect that or not. I do not know whether they would want Coca-Cola or not, if they walked up and called for Koke or Dope how could I tell, I could not tell. I did not understand any such thing, **[1347]** that when a man asked for Koke or Dope that he really wanted Coca-Cola. I did contend that whenever a customer asked for a Koke or Dope he

(Deposition of E. J. Williams.)

expected to get Coca-Cola, that I considered that I was within my rights to sell him Konut. I don't have to be in doubt about it, if he walks up and calls for Koke or Dope I do not see where I have to be in doubt about what he wants. I do not know that he wants Konut but that is what I give him for Koke or Dope. Konut is Koke or Dope; it is just as much Koke or Dope as Coca-Cola is Koke or Dope. If he wants Coca-Cola and calls for Koke or Dope he won't get Coca-Cola, if that was what he wanted. That is my choice in the matter. I am at liberty to do it and that is the reason I do it because I want to, because I like to do it. It is fifty cents a gallon cheaper; I guess I look after the most in that line. I keep that out as Koke or Dope. They come in and call for Koke or Dope, why would I give Coca-Cola when Koke or Dope would do. I give him what he calls for. We have made that rule here, as well as we could to give exactly what he calls for. I do not remember anyone calling for Konut. I never told one of my customers this was Konut I was serving them, nor advertised it. We have never advertised that we were selling this product of the Southern Koke Company. I do not know that they want Konut, that is what I give for Koke or Dope, just because I want to, is why. I used to give the Coca-Cola when he come in and called for Koke or Dope and it was all right to them. I gave them a Coca-Cola then and this product now, because I had Coca-Cola then. I did not have the other then, that was a good long time ago. I do not know how long

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Konut has been manufactured. All I know is since the time we have been handling it and I could not tell you how long we have been handling it. I did not state in that conversation with Mr. Pierce that I believed that it would be possible for me to induce all the drug-stores, and confectionery people dealing in this sort of thing in Hattiesburg who were handling Coca-Cola at their fountains, or in bottles, to agree to discontinue handling Coca-Cola entirely, nor that I was contemplating trying to bring about such an agreement. I told him not in that line, and every fountain, I told him I believed the majority of the concerns would do it. I told him I believed it could be done. I would sign up that I would not serve it. I did not state to Mr. Pierce that I had had an understanding [1348] with the Love Drug Company, the Corner Drug Company and the Yellow Pine Pharmacy, all of Hattiesburg, for the past two years regarding the use of the product Konut by these concerns to be sold by them when Koke or Dope was asked for at their fountains, and that I believed it would be possible for me to induce all of the drug-stores and confectionery stores in Hattiesburg who handle and sell Coca-Cola thru the fountain to form an agreement to discontinue the use of it. I just told him that I believed there was a good many of them that would do it. That it could be done, such a thing could be done, it was possible. I did not have any such agreement then or at any time, nor ever proposed any such an agreement with them. I would do it if the rest would do it. I think I have

(Deposition of E. J. Williams.)

handled Coca-Cola exclusively. I do not know how long we have been handling this stuff, or how long we handled the other stuff. In the beginning the business I was handling Coca-Cola exclusively. At that time when customers came and asked for Koke or Dope I gave them Coca-Cola. That was not my understanding of what they wanted, that was what we gave them. We were not selling other cola drinks then. The suit was brought against the Owl Drug Company, of which I am a member. I believe there was an injunction entered against us in that suit but that was scratched out, taken out. Some paper they served, the way they had it drawn up prevented us from serving Coca-Cola at all, prohibited us from serving Coca-Cola at all. Our attorney informed us of that. Mr. Connor is our attorney. I do not know who served it. The marshal served it. The way it was drawn up we could not serve Coca-Cola, so our attorneys said. I never did read it, Mr. Cook did. I never read the second order. I do not remember that I have read the preliminary injunction. I do not remember seeing that.

Mr. LITTLETON.—That is an agreement to take testimony.

Mr. PIERCE.—Is it? I got the wrong document.

Mr. PIERCE.—That is the agreement there to take testimony, I do not think he ever did see that. We want to reserve the right, Mr. Littleton, to put a certified copy of it into the record.

Mr. LITTLETON.—They have not been identified. You can put them in by someone else, but he

(Deposition of E. J. Williams.)

does not identify them.

I understand the first injunction restrained us from serving Coca-Cola. I [1349] did not read it, Mr. Woolfine, I believe he said it restricted us from serving anything that was the color of Coca-Cola, any drink, Coca-Cola or anything else; it was so drawn up that we could not serve anything that even looked like Coca-Cola. I understood the modified order authorized us to go ahead and sell Coca-Cola on calls for Coca-Cola or serve any other drink.

Q. Now, let me get your understanding of your first order; you do not mean to say that you understood that first order forbid your selling Coca-Cola?

Mr. LITTLETON.—I object to his asking the witness what he understanding was, as wholly irrelevant, cumbering up the record, if the counsel wishes to put the original order in and let it speak for itself, all right, but we do object to what the witness understood about it.

Objection overruled and appeal prayed and granted.

A. Well, now, I do not remember about that order, whether we could serve Coca-Cola or not, but it was so we could not serve any drink that looked like Coca-Cola as well as I can remember.

Q. What did you understand that the second order forbid you doing and in what particular did it differ from the first?

Mr. LITTLETON.—I wish to interpose the same objection to the question.

(Deposition of E. J. Williams.)

Objection overruled and appeal prayed and granted.

A. Well, we could go ahead and serve Koke and Dope on calls for Koke and Dope, under the last order. I think our attorney advised us we could sell Koke and Dope under this modified order. When a man called for Koke we could sell him anything, Dope or Coca-Cola. We did not have to sell him Coca-Cola on calls for that. I do not understand we are restrained from doing anything. Our attorney so advised us. I am sure he did. We have not carried on our business as dispenser of the Cola drinks any differently since this last or modified order was entered than we carried it on prior to the order being issued. It has been just the same, identically the same way. We considered we were restrained from doing nothing.

Q. That is your conception and you are so treating the order of the Court? A. Yes, sir.

Q. That is your attitude? [1350]

Mr. LITTLETON.—I wish to offer and interpose the objection that counsel is going into something not brought out on direct examination, he is making the witness his own witness, leading his own witness and further that it is incompetent, irrelevant and immaterial and move that the same be stricken out.

Objection overruled and appeal prayed and granted.

Our lawyers advise us after that injunction was sued out that we could serve Koke and Dope on calls for Koke and Dope and Coca-Cola on orders for

(Deposition of E. J. Williams.)

Coca-Cola. Mr. Woolfine is a member of the firm, that was my understanding. He came and said we could go ahead and sell Koke and Dope and run like we have been doing.

Mr. PIERCE.—That is all. We will offer in evidence a certified copy of the original restraining order issued in the case of the Coca-Cola Company vs. F. E. Williams, Jr., and E. J. Williams, doing business as Owl Drug Company, rendered on the 21st day of July, 1914, and a subsequent restraining order entered by consent in the same case on a later date.

Redirect Examination.

Our attorney advised us that the injunction only prohibited us from selling some other product as and for Coca-Cola when Coca-Cola was asked for by its name Coca-Cola. We had been doing that anyway. We had not been substituting any other product so far as we were concerned so far as the manner in which we conducted our business was concerned, the injunction did not affect us one way or the other. If a customer should come into our store and ask for a package of cigarettes, I would not know what cigarette he wanted. We had Hires' Root Beer and Parke-Davis Root Beer in our store and a customer asked for root beer I would not know which he wanted. If Parke-Davis was cheaper than Hires' Root Beer, and the customer would know that the Parke-Davis was cheaper than Hires' it would not necessarily indicate to my mind that he wanted Hires' instead of Parke-Davis. I have seen the ad-

(Deposition of E. J. Williams.)

vertising that the Coca-Cola Company has done recently asking the public to ask for Coca-Cola by its name Coca-Cola and not by any nicknames. It has been repudiating any other name but Coca-Cola all over the country. Mr. Pierce, **[1351]** when he showed me his reports of the detectives on the occasion of his call at our place of business did not explain to me that they were the detectives of the Coca-Cola Company of which he was captain. Our customers know we run a soda-fountain, I reckon—I do not reckon that we have Coca-Cola on hand, we do not advertise it and put it on the fountain, we have it on hand. The names Koke and Dope do not designate any specific brand of Cola drinks. If a man comes in and says give me a Koke or Dope, I cannot tell what particular kind of drink he wants, and I cannot tell what particular brand of drink he wants.

Recross-examination.

I do not know what a cola drink has in it, I know there are drinks put up and claimed to be Cola drinks, Coca-Cola, Koke or Dope, Konut, those I have handled, I do not know what they have in them. The Coca-Cola people are advertising to ask for Coca-Cola under its true name I reckon because they want you to drink Coca-Cola, I do not know of any other reasons. I believe they claim it is very refreshing, one of the main points about it. I reckon they think you might get a substitute. (Placing in evidence the diagram of the fountain at the Owl Drug Store.)

Deposition of W. A. Hickman, for Defendants.

W. A. HICKMAN.

Direct Examination.

Twenty-four years of age, live Monticello, Mississippi. I have lived there about 8 or 9 years off and on, engaged in the drug business. It is the Hickman Drug Store, it was the Cohn Drug Store about 4 months ago. I bought the Cohn Drug Store. I was in the employ of the Cohn Drug Store prior to the purchase of the drug-store by myself. I was manager there; we had a soda-fountain. I am about the fountain frequently so I can hear the names customers use in calling for what they want. We dispensed Coca-Cola, Dope and Koke. Koke is made in Atlanta, I guess. The Dope product we got from New Orleans, the Southern Koke Company. When customers come in and want a cola drink they use different names, Koke, Dope and Coca-Cola. When a customer asks for a Dope or a Koke I give them something cold, something refreshing, to satisfy their thirst. The word Dope means as applied to a soda-fountain beverage, why, I do not know, I do not guess it means any [1352] particular brand, you take a lot of people they call most any kind of a drink a Dope. They do not know one drink from the other but want soda water and call it Dope. I had a call from the representative of the Coca-Cola Company, his name was W. D. Gable, I believe; that was October 15th, 1914. He came into the store, I asked him in. He went back and sat down a few minutes, looked over the paper, directly he got up

(Deposition of W. A. Hickman.)

and asked for a Dope *and half* of it and said, "Hell, this is not a Coca-Cola." I said, "You called for Dope and got Dope." He said, "Well, that is not Coca-Cola." I said, Koke and Dope are the same thing and Coca-Cola is different. He said "You have been substituting this Dope stuff to people when they call for Dope or Koke. Coca-Cola is what they want." I told him I did not know what they wanted, that there were two kinds, Dope and Coca-Cola and that we have both on to sell and if you had called for Coca-Cola I would have given you Coca-Cola and he talked on and said he wanted to see that company or "These damned people here sued." He said they already had a suit at Hattiesburg against the Owl Company, Owl Drug Store and that a decree was entered keeping them from handling Dope, this New Orleans product. He said if we did not quit handling it they would sue us. His manner was very abusive; he seemed like he did not have a bit of respect, and that he was proud of it. He said he would like to go back and look at my barrels. I told him I did not have any dope in my warehouse to show him. He did not tell what concern he was with until he drank a half. I guess he had drank a half glass before he told me, he had drank it and told me he was with the Coca-Cola people and was around trying to catch people selling Dope, a detective I guess, another one of the detectives who go around over the country spying on the trade. I wrote to the Southern Koke Company at New Orleans with reference to that matter. Defendants' Exhibit #231 is the

(Deposition of W. A. Hickman.)

letter I wrote the Southern Koke Company.

Mr. LITTLETON.—I now tender and offer in evidence as Defendants' Exhibit #231, the letter identified by the witness, dated Monticello, Mississippi, October 24, 1914, and tender and offer it in evidence on behalf of the defendants in the above-styled causes.

Cross-examination. [1353]

I have not the letter of the 24th with me, it may be on file. When I return I will get that letter and forward it to the commissioner to be filed in this record. When a customer calls for a Koke or a Dope they want any cola drink, that applies to all character of soft drinks. I have been in the drug business about 15 years. In the line of cola drinks during all that period, I have handled just Dope and Coca-Cola. Prior to becoming owner of the Hickman Drug Store I was with the Cohn Drug Store, that was the same concern. The Cohn Drug Store handled the same thing, the product of the Southern Koke Company and Coca-Cola. They handled this product of the Southern Koke Company ever since I have been with them, it would be about two and a half years ago. A lot of people call for Koke or Dope and do not know what they want. I have asked several. Asked what kind of drink you want. They say I don't know, anything, what kind of cola do you sell here. I give them Coca-Cola and sometimes they do not like it. If a man calls for a Dope I give him a Dope and if he calls for a Coca-Cola I give him a Coca-Cola. I do not know whether

(Deposition of W. A. Hickman.)

people that ask for Dope or ask for Koke may want Coca-Cola. You take people where I am they do not know, you cannot find two out of ten there that know Coca-Cola from Dope, they are not used to them, I have tried the two drinks. A lot of people they could not tell the difference in Coca-Cola from Dope and Koke, there may be people that can. The two drinks look the same and taste the same, a customer receiving it would not know the difference. Prior to going into the drug business I was salesman in a drug store. I have heard the terms dope and koke used before I went into the drug business. I knew of different matters, I knew there was two companies handling it, a lot of people do not know it. I could not tell the first time I heard those terms applied to a soft drink, 4 or 5 years I guess maybe. I did not specially know of the Southern Koke Company until I began business. I knew of Coca-Cola, I had seen the advertisements, it is not so overly advertised in my country down there, the public as a rule in my community know of Coca-Cola. I knew of Coca-Cola, Gay-Ola, Ola and two or three other different drinks. When I went to a **[1354]** soda-fountain I always called for Coca-Cola when I wanted it, but I sometimes called for Dope and then I got anything they had. When I asked for Dope they give me Dope or Koke, I would not know what to expect. When asking for it I wanted something cold I did not care what it was. If they served lemon soda, or strawberry, that would have been perfectly satisfactory. I had a call from the rep-

(Deposition of W. A. Hickman.)

resentative of the Coca-Cola Company. He claimed to be a detective, I could not tell you that he was a salesman he did not offer to sell any Coca-Cola to me. The first time I saw him was then. He told me he was representing the Coca-Cola Company, that he was around catching those people, and he also showed me a number of analyses where they had found parties had not been handling Coca-Cola altogether. He showed me a record of the gallonage I had bought from the Coca-Cola Company, he did not show me that of other concerns, just showed me mine. There are 3 or 4 other dealers in the town I think. In our fountain we have different jars for them, two jars, the jar that had dope in it has Coca-Cola on top and Dope, I have just a little sign up there "Dope"; the jar that contains Coca-Cola has a Coca-Cola sign. It is a little celluloid piece, the jar goes with the fountain. I keep the Dope in a jar, sometimes one and sometimes in another, in a soda-water jar, the Dope. I am in attendance at the fountain myself always. I serve all the people. I never serve Dope or Koke when Coca-Cola is called for, if they ask for Dope I give Dope. For a Dope he gets Dope and if he asks for Coca-Cola he gets Coca-Cola. I may have handled Coca-Cola exclusively, a week, something like that, prior to that time, if a customer told me he wanted Dope I would give him anything, strawberry, lemon, lime, anything. I pay one fifty and one twenty-five. There are some rebates on that dollar and a quarter, and I get a rebate on Coca-Cola. I buy Koke and Dope from the Southern Koke Com-

pany, Koke or Dope is the same product, it costs a dollar and a quarter and I get a rebate. I get a rebate of 25 cents for paying in a certain length of time, if it is not paid then it is the full amount. We are rebated for the number of gallons we use during the year for Coca-Cola. I handle this product because it is cheaper than Coca-Cola, that is my reason for handling it, but if he asks for Coca-Cola he gets **[1355]** Coca-Cola every time. I make more money on it and get the same price for the product over the counter, it is as good a drink, and he cannot tell the difference from the Coca-Cola. I will bet you I can go to the fountain and you cannot tell the difference. If he asked for Coca-Cola and I served him Dope, he would not know the difference, I guess that is very nearly true of every customer. This Gable he just asked for a Dope and I give him a Dope and he said, "Hell, this is not any Dope, that means Coca-Cola. This is a God damned old Dope." He set there for several minutes and one of the doctors come in. I looked to have a little trouble. I had to leave, you know, and he stayed around, and he went on down the street. He liked to have gotten into trouble down the street. He is a very insulting fellow. If he had come in like a gentleman there would not have been anything to it. Other representatives of the Coca-Cola Company come in and proceed to treat me nice like I first opened up. He told me that Dope and Koke were nicknames for Coca-Cola, he said if a man called for a Dope or Koke he wanted Coca-Cola. I do not know whether

(Deposition of W. A. Hickman.)

a man wants Coca-Cola or not when he calls for Dope or Koke.

Redirect Examination.

I do not serve Dope or Koke when our customers ask for Coca-Cola, and the reason is I do not know what they want when they ask for Dope or Koke, they do not designate any specific drink.

Recross-examination.

(Referred to Exhibit #231.) I just wanted to see Mr. Patton if they could sue me for handling Dope. He guaranteed me that I would not be sued if I would handle the Dope. I asked him about it when he first came there. The first time I bought from him and he said he would guarantee me I would not be sued for selling it, guaranteed me against being sued by the Coca-Cola people. They had been threatening our people here and I asked them about it and told them if they were going to sue those people, I did not want to get into it and be sued myself. They were suing them for handling substituting Dope for Coca-Cola. The way I understood it, they claimed the people that were handling Dope and Koke, on calls for Coca-Cola that they were substituting, not giving what they wanted, if I did not know right **[1356]** then, that is the reason I wrote the Southern people asking about it. I had heard in different ways about the various suits. I did not think at first when I began handling it, that I would be prosecuted. We did not make any agreement, Mr. Patton said, "I assure you there won't be anything to it at all." I asked about it, asked if they

(Deposition of W. A. Hickman.)

sued these other people around for handling Dope would I get into trouble for handling it. He said, "No, there is nothing to it." He did not guarantee it, he assured me I would not be trouble. I do not know whether I bought the first from him or through the house by mail. You take most traveling men they call for Coca-Cola, when they want Coca-Cola, they call for Coca-Cola by the name of Coca-Cola. The traveling men do when they come in my store. People use the terms, Dope or Koke, I would not think they meant Coca-Cola altogther. The public don't know about them unless they read and see the different names, advertisements and such as that; pick up any paper, Coca-Cola is advertised in the paper, the other products I could not tell you, advertisements of them lately are just a few cards, we displayed a few of those advertisements, something like blotters, something like a month ago I had a few. I did not have hangers on the fountain of the Southern Koke Company nor Coca-Cola either. Most of our customers know we are handling that product. A few I do not tell and a few I do. I do not get outside and tell it you know. I handle these other products because they are cheaper.

Redirect Examination.

I handle Dr. Pepper at our soda-fountain, I do not know who makes it. I get the extract and make it myself and I forget who it is from, it is not Hire's Rootbeer, this is a fruit root beer. I have frequent calls for root beer at my soda-fountain. They do not know I have it, they call for it. I do not know how

(Deposition of W. A. Hickman.)

our customers know I have orange, lemon, lime and those things, we do not advertise them, they are not advertised, plastered all over the country. We handle cigars at our drug-store also, some cigars cost more than others. If a man comes in and asks for a cigar and does not mention a brand I would give him the cheapest if I did not know what he wanted. Just one Coca-Cola is all I know and but one Dope that I know of, that is the New Orleans product, Dope. When a man comes in and [**1357**] calls for a Dope, I do not know, I give him what he wants.

Deposition of Mrs. M. C. Dozier, for Defendants.

MRS. M. C. DOZIER.

Direct Examination.

Sixty-five years of age; Woolfolk Walker is my oldest brother; he persuaded me to go into Coca-Cola and I furnished the money, $1,200 for the purchase of my interest, but what my interest was I never have found out. I never got any money for the sale of it. I never got any money for what it made, you know, or receipts from the making of it. I never knew anything at all about it, I could not tell you anything to show that I owned an interest in Coca-Cola. I could not say whether or not Woolfolk Walker, my brother, put any of his own money into Coca-Cola at the time of this purchase, or if he had any money to put into it. I was living up here and he was living in Columbus. He borrowed a thousand dollars after I paid the twelve hundred dollars to him to buy the interest. I did not know

(Deposition of Mrs. M. C. Dozier.)

at that time who it was, but finally it proved to be Mr. Lowndes and Mr. Venable. He borrowed a thousand dollars from me, explaining that he would get it back in a few days. I very reluctantly let him have it because I wanted it for a home, and he paid me back three hundred dollars of that money and that is the only money he ever paid me, and later I have lived in Atlanta but could not get any knowledge what I had or any interest in it. (An exhibit marked Complainant's Exhibit #82, dated December 10, 1887, purporting to be a conveyance to you and Woolfolk Walker for a consideration of eight hundred dollars from Lowndes and Venable for their interest in Coca-Cola syrup and extract and the registered label in the patent office.) I have signed a paper of this sort, at Mr. Venable's soda-fountain, his drug store. It was on the corner of Marietta and Peachtree. I said, "Is that mine?" He said, "No, I will give you a copy." But the copy I never received. I have urged him very much to give me a copy. I urged my brother. I subsequently found that paper, I found it when I broke up housekeeping and went to live with my son-in-law. I was looking through my old papers in an old trunk and to my surprise and consternation I came across this, showing I really did have an interest in Coca-Cola. I found it about 3 years ago, a little over perhaps, between 3 and 4 years. After I found it I gave it to my son-in-law to look at and to see if it [1358] was really of any value and he carried it and showed it to a lawyer and I took it and saw in the paper an

(Deposition of Mrs. M. C. Dozier.)

article that Mr. Candler had written, that he had gotten the Coca-Cola in some old way and then I took it to Mr. Lilly, who is a nephew of my husband and asked him if he would look into it as I found I did not know what value it was and wanted to know, but I have not got that paper now, Mr. Lilly has it I suppose. After the purchase of this interest in Coca-Cola I did not sell my interest to anybody. I could not sell it when I did not have it, I did not know what I owned. (A paper marked Complainant's Exhibit #67 dated the 17 day of April, 1888, purporting to be a conveyance from Woolfolk Walker and Mrs. M. C. Dozier of the formula for Coca-Cola syrup and extract, and the label and title in Coca-Cola syrup and extract to Asa G. Candler.") I cannot, with my best knowledge and consent say that I signed such a paper. I did not sign any paper conveying my interest to anybody, I did not know what interest I owned. I never signed any paper in the presence of Mr. F. M. Robertson that I remember. If I did I think I would remember it, but I could not positively say I did not, because I do not think I know Mr. Robertson and Mr. Wylie and therefore I do not have any remembrance whatever of ever signing any such paper because I had no knowledge of the sale of Coca-Cola. I first found out that Mr. Candler was claiming an interest in Coca-Cola in the summer of—I do not know the date. I could not swear to the date of the year, but it was that summer, it had been sold two weeks, and my bother had gone west before I had any knowledge whatever of

(Deposition of Mrs. M. C. Dozier.)

the sale of it and I said although I owned an interest, but where is my authority to show, I had no paper to show, I had no authority, I never was given a paper to show, so it was sold without my consent or without my knowledge.

Q. I hand you a paper marked Complainant's Exhibit #74, purporting to be a conveyance from you and Woolfolk Walker to Asa G. Candler of the same thing, Coca-Cola and of the formula and extract, dated the 24th of August, 1888, purporting to be witnessed by F. H. ——— and S. H. ———. J. P. I will ask you to state whether or not you signed any such document as that.

A. No, sir; I could not swear I signed that. I would not be willing to [1359] swear I signed it, in fact I do not know anything about it, I never saw that and never heard of it. I signed no paper to the Coca-Cola Company with not any witnesses to them. I did not sign any paper at all conveying any interest to Asa G. Candler or anyone else. I remember that positively because I knew nothing of it.

Q. I hand you Defendants' Exhibit #126, purporting to be a note signed by Asa G. Candler, dated August 30, 1888, made payable to Mrs. M. C. Dozier for $200, and on back of it purports to be indorsed by M. C. Dozier, I will ask you to state whether or not a note of that kind was ever turned over to you and whether or not you indorsed it.

A. No, sir; most positively I never received a cent. The signature on the back looks like mine but I would not swear it was mine because I never received any

(Deposition of Mrs. M. C. Dozier.)

money, I never received any notes, I never endorsed any notes.

Q. I hand you another paper marked Complainant's Exhibit #129, being another note signed Asa G. Candler, and it looks like it is intended to be Asa G. Candler, dated August 30, 1888, made payable to Mrs. M. C. Dozier for $200? And this purports to be endorsed by M. C. Dozier; I will ask you to state whether or not you received that note and endorsed it.

A. No, sir; I never received any money whatever. I did not know whether I owned it or not until after I found that paper. After I had purchased this interest in Coca-Cola all that I know is that on one occasion I went down to see it made.

Q. That is what I am speaking of.

Mr. HIRSCH.—Do not lead the witness, I object to that.

Objection overruled and appeal prayed and granted.

I never had any agent or anybody to make Coca-Cola syrup for me. My brother, shortly after this, about August, 1888, went to Hot Springs, so I heard, he did not tell me good-bye, not a word. I never hear from him after he left. I wrote repeatedly but none of my letters were ever recognized or answered. He never paid me back the balance of the thousand dollars he borrowed. I could not get any paper to show that I had loaned him the thousand dollars or any paper to show that I had advanced [1360] to him the twelve hundred dollars that was

(Deposition of Mrs. M. C. Dozier.)

for?" He said, "It is to convey you the property. I will give you a copy and send it to you." Mr. Walker said that. That looks like my signature. I did not read the paper over but that paper looks like the one I had, I am not sure that is the one I had. Mr. Little had the one I had, that is Mr. John D. Little, the attorney here in Atlanta. That is the one that they said Mr. Venable and Mr. Lownds sold, that is the interest. My brother never did send me a copy. My brother was staying at my home when my brother died and he occupied her room after her death and her trunk was there and that trunk, when my sister went away she wanted it so I took all the papers and everything that was his and hers and put them in a hat-box that was also hers and in a yellow envelope with some old estate papers, when I went to move I thought it was well to get rid of all papers that I did not need, so I went into this band-box and took out the papers and in taking them out discovered this that is my own first knowledge of it, except as to signing it and what they told me. I cannot say whether that is the paper or not. I signed a paper for Mr. Venable and Lownds. After I paid out my money and after I signed this paper I knew that my brother and others were manufacturing Coca-Cola and that he was traveling for them, that is what he told me. I went to the place of business and saw him around there, he carried me down and showed me where they were making it.

(Complainant's Exhibit #67.) I have no knowl-

(Deposition of Mrs. M. C. Dozier.)

edge of ever seeing it. I saw that in Mr. Little's in the fall of 1914, that is the first I saw of [1362] it. I told Mr. Little of this property. The first person I told was my son-in-law, his name is Mr. Ridley, J. F. Ridley. I suppose I showed this paper to him. (Complainant's Exhibit #82.) I suppose that was about 3 years ago, no, it has not been quite three years because I did not show it to him when I first moved with him in Parietta three years ago. I could not swear that it was last fall that Mr. Little and myself met in Mr. Little's office, now that Defendants' Exhibit #67 was presented to me. I do not know what papers were presented to me. One had a big red seal on it, I do not think that is it; it had a big, great big seal down here, and it had around that seal, Coca-Cola Company. I never knew up to that time what he actually bought. I cannot say whether that is my signature or not. I never saw Complainant's Exhibit #74 before to-day in my life. I never have seen but one paper and that paper is the one that had the amount that Coca-Cola was sold for. One paper was presented to me that had a very peculiar signature, but it was not one of those that I remember. I could not swear that is my signature on Complainant's Exhibit #74, as I do not know anything about it. I never saw Complainant's Exhibits #127 and #128 before in my life. I do not know anything about those notes at all, I was kept entirely ignorant of all the facts by my brother who had charge of it. He had charge of the whole thing and never discussed it with me at all, in fact, when he got control

(Deposition of Mrs. M. C. Dozier.)

of it he never came near me at all and kept the information away from me. I remember the meeting we had in Mr. Little's office. That was when I consulted him about the paper I found, you came over and showed me the papers which you had. I could not swear whether they are the same papers which you presented to me to-day or not.

Q. 113. Did you or did you not, Mrs. Dozier, admit that the signature of Mrs. M. C. Dozier, Exhibit #174 was your signature?

A. You will remember that you showed me a paper and he said "Aunt Maggie, is that your signature?" I said, "I never saw it." He said, "I know it is" (that is Mr. Little). And it certainly looked like it, and then there is another paper, [1363] too, about what the Coca-Cola was sold for, and the next question he put, I said, "Mr. Hirsch, may I look at this? I heard it was sold for twenty-five dollars and a ticket to the West and I am anxious to know what it did sell for." You said, "Certainly, you are very kind." I looked at the paper, I was a trying to make the most of the loss, I was a trying to see, and he said, "Aunt Maggie, you know that is your signature." Well, I was surprised and I did not answer, you remember, Mr. Hirsch, and then he said, a second time, "You know, Aunt Maggie, that is your signature." I said, "Well, I suppose it is," every word I said, and then you got up and took the papers and left and I left; that was every word that was exchanged. Mr. Little just said, "Well, Aunt Maggie, if that is the case, then what can you do?"

(Deposition of Mrs. M. C. Dozier.)

I did not want Mr. Little to be involved in anything. I just wanted to know the true history of the paper and I had never seen the paper because I did not know of the sale of the Coca-Cola, and if I did not know of it how could I sign it. To the best of my knowledge and belief I cannot say it is or its not the paper. My brother, Mr. Woolfolk Walker, carried on the entire transaction in regard to Coca-Cola. I gave him twelve hundred dollars to buy my interest with. After that I never heard any more of it. He never came near me any more. He actively engaged in the business at first but he did not afterwards, because they moved away from down there. I saw my brother often after I gave him the twelve hundred dollars, but I did not see him after I loaned him the one thousand dollars. I suppose I advanced him the thousand dollars a week afterwards. I saw him between the time I gave him the money to buy the interest and the time I loaned him the thousand dollars. I suppose he was actively engaged in the business. He seemed to be. He claimed a title to it. I saw him a few moments, just a few moments in the summer before he left here the last time. I just met him and he did not tarry five minutes. Don't ask me what years those were. About 1888 or 1889,—won't the papers say that, August? It must have been then.

Q. 142. That shows you bought in April and one paper purports to sell in April and the other in August, it was around those dates? **[1364]**

A. Was not all of it bought at one time?

(Deposition of Mrs. M. C. Dozier.)

Q. 143. No, he first bought part of your interest and the second bought all of your interest, those papers purport to show that?

A. It is all news to me; I do not know anything about it, Mr. Hirsch.

Q. 144. But the time I am asking about, Mr. Walker, was about the time of those papers, from April to August, 1888.

. I advanced the twelve hundred dollars that winter, it was bought. In 1887, I think it was. I cannot remember the date but I think about that time, wasn't it, 1887?

Q. 147. This shows 1888.

Mr. LITTLETON.—Another paper shows December 14, 1887.

Q. 148. Well, about that time?

A. Yes, sir, about that time, it was bought.

Redirect Examination.

(By A. B. LITTLETON. Esq.)

I saw Walker making the Coca-Cola. I went down there once. I never went where he was making it, bottling it, where he put it up there and I saw him bottling the Coca-Cola which I suppose he had an interest in, and he said so, but I do not know who the bottling works was owned by at all, I never could find out. I tried. That was in the spring after he moved down there on Marietta Street, that is the bottling works was put up. It must have been, as near as I can get it, in '88, because he lived on the corner of Courtland and Courier Streets in '87. It must

(Deposition of Mrs. M. C. Dozier.)

have been early in the spring. I cannot say positively what month.

Recross-examination.

(By HAROLD HIRSCH, Esq.)

I said my brother moved from Courtland and Courier Streets down on Marietta Street and rented two rooms, so that we could be more convenient to the business, and it was when I went down there I saw it, on Marietta Street. I signed this paper, buying that interest in December, 1887, and Mr. Venable was at the corner of [1365] Peachtree and Marietta. I do not remember the date.

Redirect Examination.

(By A. B. LITTLETON, Esq.)

Mr. Little did not advise me as to the statute of limitations. He said that I would not be barred by the statute of limitations, I think, he said, as well as I can remember, I won't say this, I think, but as well as I can remember he said that was confined *to not noted* if I understood him right, but not to this. I mean the statute of limitations was confined to notes. I do not know that he said that. I tried to get other advice as to my rights in the premises, from some other source. It was only shown to Mr. Hill. He said he did not know whether there was anything in it, I would be barred by the statute of limitations. Prior to this visit that I made down to the plant I never seen any Coca-Cola made prior to that time.

Mr. Charley Pemberton told me he was making it. It was in the afternoon and there was a big kettle like planters make syrup during the war when I went

(Deposition of Mrs. M. C. Dozier.)

down there, out in the little back room in the extreme "L" of the residence, when I went down there. He was stirring, I do not know whether it was a stick or a spoon, whatever it was, but I remarked how black it was, I suppose the syrup must have done that, that was the only time I was down there, and the only way I knew it was Coca-Cola was what they told you. I never tasted it.

Mr. HIRSCH.—Mrs. Dozier, do you remember who else was there at that time when you went to the manufactory?

A. Yes, I remember clearly, my sister.

Mr. HIRSCH.—Who is your sister?

A. Mrs. Dantnigac, or Augusta, she is dead now.

Mr. LITTLETON.—Mrs. Dozier, what was the character of your brother's handwriting, did he write a good deal like you or different from you?

A. Well, sir, the the formation of our letters were obliged to be somewhat alike, because he taught me to write.

(These were all the depositions taken and filed by defendants.) [1366]

Plaintiff's Rebuttal Testimony.

(The following depositions were taken by the plaintiff in rebuttal, at Birmingham, Alabama, on June first and second, 1915.)

Deposition of S. A. Ellis, for Plaintiff (In Rebuttal).

S. A. ELLIS.

Direct Examination by Mr. HIRSCH.

I reside at Woodlawn, a suburb of Birmingham.

(Deposition of S. A. Ellis.)

I have been in Birmingham pretty well all of the time for the last fifteen years. I am 65 years old. Yes, sir, I was connected with J. C. Mayfield, Sr., in the soft drink business in 1902, I believe it was. I think that was the year. He was doing business then over on Morris Avenue. He was manufacturing drinks of different kinds, I couldn't name all that he handled, I don't know. The concern was called the Celery-Cola Co. You ask what was the name of the syrup he was manufacturing; well, I don't know that he said. He was manufacturing "Celery-Cola" syrup, or Cola syrup, I think that was what they called it. He employed me simply to canvass the town to the various stores and to take orders for the goods that were hauled out in wagons, and I was rather superintending the delivery of the goods that were delivered from the wagon. I was not connected with the manufacturing at all. "Celery-Cola" was the principal thing that was being delivered from the wagons. He also had some other drinks—soft drinks of different kinds—different flavors, you know. I don't recall to mind now the names of any of the others besides "Celery-Cola."

(This witness, having claimed his witness fee for attendance, $1.50 was paid him by counsel for plaintiff.)

(There was no cross-examination of this witness.)

Deposition of L. M. Barclift, for Plaintiff (In Rebuttal).

L. M. BARCLIFT.

Direct Examination by Mr. HIRSCH.

I reside at 1904 Alois Avenue, Birmingham, Ala. I have resided in Birmingham thirty years. I am 51 years of age. At present, I am traveling for the A. C. L. Haase & Sons Fish Company of St. Louis, Missouri, for which concern I have been traveling for about a year. Before that I traveled for Swift & Company in Texas, Oklahoma and Arkansas in the soap department. [1372] Yes, sir, I was at one time connected with the Schooler Vinegar Company located at Birmingham, Alabama. I was with the O. L. Gregory Vinegar Company and Schooler Vinegar Company mixed up together, about seven years. I was with the Schooler Company when it was bought out. I understood that Mr. J. C. Mayfield bought it about 1902, somewhere along in there, after which purchase I was employed by Mr. J. C. Mayfield, Sr. The name of the concern was the Mayfield Manufacturing Co. I was employed as traveling salesman. I was with the Mayfield Manufacturing Company off and on—I can't say exactly, but for about a year, something like that, and then I went back to Paducah, Ky., to O. L. Gregory, and then I got sick and had to go to the hospital, and, while I was sick, Mr. Mayfield came up to see me and said that when I was able to go to work he wanted me to

(Deposition of L. M. Barclift.)

come back with him, which I did. Mr. Mayfield was not running any other business at the time besides the Mayfield Manufacturing Company, that I know of. That concern was located on Morris Avenue, South Side, at 20th Street, in Birmingham. You ask if I can name some of the people that were employed by that concern at that time; well, I can name the people that were around there, supposed to be working for them. Mr. Pogue, I believe it is—I forget his name—was one, Mr. John Ensley was another, and there was two or three colored boys there all the time. Yes, sir, Mr. Garrett was at work. I sold everything that the Mayfield Manufacturing Company gave me to sell, which was vinegar, cider, and bitters—some kind of bitters, I forget what it was they called that—"Jiggers," I believe they called that. Yes, sir, I sold "Celery-Cola" for them in syrup and in bottles. I don't remember that I sold any "Pepsin-Ola" or "Hop-Ale." You ask if, in my experience, and while I was working for them, I ever heard of any product manufactured, advertised, sold, or handled, or anything done with it, or pertaining to it, spelled by the name of "K-O-K-E"; no, sir, I didn't. That was concerning the Mayfield Mfg. Co. The first I heard of Mr. Mayfield manufacturing or making "Koke" was, I think, in 1913, at Little Rock, Ark. You ask if I ever heard of him making, manufacturing, selling, or advertising—either Mr. Mayfield or any of his companies that I worked for—a product by the name of "Koke" up to that time; not until that time. I would like to make one statement if it's

(Deposition of L. M. Barclift.)

proper. While I [1373] was working for the Mayfield Manufacturing Company you understand, I was practically out on the road, and so far as anything that they manufactured in the building, that wasn't in my province, but I know I never sold anything of that kind or heard anything of that kind.

Cross-examination by Mr. DART.

You say that my last answer indicates to your mind that I was a vinegar salesman, primarily; well, cider and vinegar, yes, sir; that was my specialty, I sold what they gave me. You say that every salesman has a trade of his own, or a line of his own, and you ask if I had none; well, I was working for the Mayfield Manufacturing Company and they paid me a regular salary and I sold what they gave me to sell. I had been selling vinegar and cider for two years. I was in the employ of the Schooler Vinegar Company for about seven years—them and O. L. Gregory together—selling cider and vinegar. You ask if I hadn't made any trade or business in that period; only cider and vinegar. That was my line at that time. I don't know that I was known as a cider and vinegar man, or any other kind of a man. Yes, sir, I had a trade in vinegar and cider and I was sent out on the road primarily to sell vinegar and cider, that was my business. If I handled any soft drinks at that time, my main idea was to sell vinegar and cider.

Redirect Examination by Mr. HIRSCH.

I was called here under subpoena. Yes, sir; I claim my attendance fee and expenses. I have an

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itemized list of my expenses and I will present them.

(The witness having claimed his attendance fee and expenses the same was paid to him by counsel for plaintiff, the sum amounting to $25.)

Recross-examination by Mr. DART.

You ask who asked me to come here; I was telephoned to by Mr. George Bodaker—that gentleman there (pointing to the gentleman in question) at Dathan, Alabama, that there was a subpoena for me, yes; sir, the gentleman sitting in the room here looking at me. You ask who he is; well, he was formerly Chief of Police of this city here. No, sir; he did not tell me that the Coca-Cola Company wanted me to come here to testify. He told me that there was a subpoena from the United **[1374]** States Court for me and if I would agree to come that he would pay my expenses without having to have me summoned by an officer. Yes, sir; I had been summoned by an officer; since arriving here I have been given a subpoena from the Court. No, sir; he did not tell me what he wanted me to come here and testify to. No, sir; I don't mean to say that I entered this room without any idea of what I was going to testify to. I don't mean to say anything—I mean to answer your questions. You say that I am very clever, and you ask me again if I didn't know when I came into this room what I was going to testify to; well, I understood I was a witness for the Coca-Cola Company. I understood that from the subpoena, and no other way at all. I came into this room, which is a room in a hotel in Birming-

(Deposition of L. M. Barclift.)

ham, in company with Mr. Pogue. No, sir; he did not introduce me to the room, not practically. Before I came into the room I came up 20th Street with Mr. Pogue. I was in the adjoining room a few minutes ago with several gentlemen, not only with Mr. Pogue, but with several others. No, sir; I did not say that I came all the way from home to this place and came into this room and sat in that chair without having spoken to anybody before I came into this room as to what I knew about this case. When I came from home this morning I came in on the South Ensley car. I walked up to Mr. Bodeker's office and then walked from there up to this hotel with him. He went away and I met this gentleman, I believe (indicating Mr. Pierce). I only spoke to them, just met them, and that's all. Before I came and sat in this chair I had not talked to anyone on this subject—on this question—on this case, about what I have been testifying here. No, sir; I have not repeated to any one, either wholly or in substance, what I have said in this room, nor any part of it. Yes, sir; I talked about other things. Mr. Bodeker and I were walking up the street and we talked about several different things—about Mr. Patton, an officer who used to be here, a friend of mine, getting shot and died. Anything else I talked about had nothing to do with this present matter except that Mr. Bodeker brought me up here and introduced me. I live a mile and a half or two miles from this place. Mr. Pearce, I believe, sitting there, told me to make up my memorandum of expenses

(Deposition of L. M. Barclift.)

and witness fee, that's all he said to me in that connection. **[1375]** No, sir; there was no talk about anything in this case besides what I have said, not a word. I got this telephone message from the Chief of Police about 12:30 yesterday. Yes, sir; Mr. Bodeker is an old friend of mine. He told me over the telephone that I had been summoned before the United States Court to testify in behalf of the Coca-Cola Company, I had never had any dealings with the Coca-Cola Company, and hadn't any idea what they could possibly want with me. All that I have been talking about occurred about 1902—about twelve or thirteen years ago. No, sir; it is not all perfectly fresh in my mind. Yes, sir; I think I could recollect something else that happened in 1902 besides what I have been testifying about. To be positive about the dates, etc., I am not. I don't think Mr. George W. Bodeker is still Chief of Police. I think Mr. Martin Egain is. Yes, sir; I have talked to Mr. Bodeker within the last eight or ten years. The last time I talked to him on any subject was, I think, somewhere about two months ago. I was talking to him about my son having an employment with him. No, sir; my son is not employed by him. No, sir; I did not ask him to get my son employment he was asking me if I thought the boy could do certain things for him, but he did not do them. No, sir; I did not say this morning that I had gotten this telephone message at a hotel in Chattanooga. I didn't say he had telephoned me in Chattanooga recently. I think it was some

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sixty days ago that he telephoned me in Chattanooga. He asked me to come to Birmingham, saying that he wanted to see me on a piece of important business, and I came in response to that telephone message from him. You ask what was the important business that he wanted to see me about; I made a statement in writing to a young lady stenographer up there—I believe Mr. Bodeker's daughter—in regard to this business—practically the same as you have been asking this morning. She took my statement down. I don't think there was any one present but the stenographer, but Mr. Bodeker came in later. I went to Mr. Bodeker's office in the Brown-Marx Building to make that statement. I believe Mr. Bodeker asked me the questions in front of the young lady. You say that I said I made a statement first and Mr. Bodeker came in later, and you ask if that is what I mean to say; I mean to say that I was there—he was there when the young lady took it down and then she wrote it off and I signed it, after he left—he asked me the questions and she took them down in short hand and wrote it down and handed it to me and I signed it. Mr. **[1376]** Bodeker had gone. Now to get the story straight, about sixty days ago Mr. Bodeker telephoned me at the hotel Patton in Chattanooga to come to Birmingham on an important piece of business, and, when I got here, I went to his office and there he asked me certain questions and I made certain replies, which a young lady took down in short hand. She afterwards wrote out the questions and I signed

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the statement. You ask me how that tale compares with what I have been swearing here the last twenty minutes—that before that I had never spoken to anybody on this subect matter and was speaking from a memory perfectly fresh, although ten years old, and you ask which is true the first or the last; I think it's practically the same. You say, no, that I said, and stuck to it under your cross-examination, that I had never spoken to anybody about this matter until I came into this room and sat in this chair; I said to-day, and you asked me to-day. That's what you implied. You asked me when I came from home if I had been talking to anybody on this subject, as I understood it. I make the distinction that you asked me whether I had talked to anybody to-day. You ask if I didn't think it was fair to volunteer that I had talked to somebody sixty days ago; I think it's fair and proper to say what I say here, or anywhere else, or at any time. I wasn't paid anything except my railroad fare for coming down from Chattanooga to talk to Mr. Bodeker. He paid my railroad fare and expenses. Yes, sir; while I was working for the Mayfield Company I sold other things besides cider and vinegar. You ask how much I sold of anything else; I couldn't say—I sold right smart "Hop Ale" and some Bitters and some cider and vinegar and some "Coca-Cola" syrup—I mean "Celery-Cola" syrup. I didn't sell any individual bottles, but I sold several gallons of the syrup. I sold it to merchants and contractors—different people over the country—I can't remem-

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ber who. You ask me to give the names of some of those to whom I sold it; I sold it to quite a few people, I can't remember all of them right now. I sold J. D. Miller and Bros., I believe it was, some cider and vinegar. They were railroad contractors, and I sold Mr. Neal and Mr. Phillips, who were railroad contractors, and I sold Walton-Wilson & Company at Copper Ridge, Tennessee, a lot of stuff. I sold them principally cider—what we called cider. I sold very little of anything except cider and vinegar and **[1377]** "Hop Ale." No, sir; I did not go to any of the bottlers and sell anything to them, that was not my work. I had nothing to do with the bottlers. I sold some "Coca-Cola" to people that were practically asking for it—so many of the contractors around here would say "send me some 'Coca-Cola' "—I mean "Celery-Cola." You say that I have three times used the word "Coca-Cola" for "Celery-Cola" and you ask which is right; "Celery-Cola," I mean, I just had "Coca-Cola" on my mind. I don't know how much I sold, I may have sold 200 or 300 cases. I might have sold fifty, I don't remember, but as a general thing I never sold any unless somebody asked me for it, but I did sell some without being solicited. You ask how much the ex-Chief of Police paid me for coming—about sixty days ago—from Chattanooga. I forget, something like $10. You ask if that is what it cost me to come here; well, I had to go back you understand. You ask how far Chattanooga is from here; I think the fare is $4.00 and something—$3.98 or somthing like

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that, and he paid me something like $10.00, I don't remember exactly the amount. I don't say that occurred sixty days ago, but about sixty days, the papers will show. You say that I can remember what happened thirteen years ago very accurately, but I can't remember sixty days ago; no, I can't give you the exact date, I have it in my book. I will have to get my book and get the exact date. Yes, sir, I have an independent memory—something like sixty days ago. I think the amount of money I got from the Chief of Police about sixty days ago was about $9.00 and some cents, that's as near as I can get to it.

Re-redirect Examination by Mr. HIRSCH.

Mr. HIRSCH.—"We tender in evidence as Plaintiff's Rebuttal Exhibit Number 1, the subpoena issued to Mr. Barclift, an itemized statement of his expense account and receipt from the railroad and I hereby present to the witness $25.00, as shown by the statement.

(The document marked Plaintiff's Rebuttal Exhibit #2 is the statement I signed in Chief Bredeker's office.)

(Plaintiff here tendered and offered in evidence Plaintiff's Rebuttal Exhibit #2.)

(Defendants object to the introduction of Plaintiff's Rebuttal Exhibit #2 because the witness has already given his testimony and **[1378]** it is secondary evidence. Objection overruled. Exception.)

(Deposition of L. M. Barclift.)

Re-recross-examination by Mr. DART.

You ask which I stand on this testimony I have given here this morning or this statement? (Plaintiff's Rebuttal Exhibit No. 2.) I stand on both of them. You ask if I want them to dove-tail together; I want them to be just exactly what I swore and what I signed. If there is any difference between the two statements,—this document which I signed on April 11th, and the testimony I have given under oath here, to-day,—I stand on this oath and on that signature. I don't remember that this statement was under oath. I don't think anybody swore me to it. You ask, if there is any difference between my testimony and my signed statement, which you shall accept as true; bring me up again—give me a new chance. Well, what I have testified to here is the truth—as far as I know. There might be a difference in the questions asked here and in the statement. What I have sworn to is the truth, as far as I know.

Deposition of Charles J. Pogue, for Plaintiff (In Rebuttal).

CHARLES J. POGUE.

Direct Examination by Mr. HIRSCH.

I want to make a statement. I was summoned by the Commissioner the last time that they were taking evidence here, to examine some witnesses for the other side to this case, and, being associated with Mr. Mayfield, I naturally talked to some of them, and I don't think it's really fair myself, to the other

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side, to allow me to testify in this case. I make that as a claim of personal privilege for myself.

I have been served with a subpoena to come here this morning together, with a *subpoena duces tecum*, to bring what papers I had in my possession, and I have brought the papers with me and that is the package right here. I left them with the Commissioner this morning. I will say further that I object to these letters being introduced here as a great many of them are personal matters touching upon a case while I was in St. Louis which we were trying to compromise and did finally compromise.

Mr. DART.—"In protection of the witness we object to the bundle of papers being opened. He has claimed privilege and he is here without a lawyer protecting him and we ask that the Commissioner **[1379]** seal up that bundle of papers referred to by the witness, and certify the question to the Court."

Mr. HIRSCH.—"I think before we are through we may have some other questions to refer to the Court."

Mr. DART.—"Mr. Hirsch has opened the package of papers after the objection, and after hearing the witness' claim of privilege. He is violating the man's claim of privilege; he has got him in a room of a hotel by himself without counsel, and I think it is unfair, in view of his statement, for counsel to deliberately open the papers, which he claims to be his own personal papers. I now ask that the papers be sealed up by the Commissioner and sent up to the

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Court for a decision on the question."

Mr. DART.—[Addressing the witness]. "As we understand the law, that package is your property, and, having claimed the privilege, you have a right to the possession of it until it is taken away from you by the Court, in our opinion of the law."

Mr. HIRSCH.—"We, in reply to that statement, say there was a subpoena *duces tecum* issued by the Court to the witness to produce these papers."

I reside at 1210½ Avenue H., South Birmingham, Alabama.

Mr. DART.—"I wish you to note, Mr. Stenographer, that while these questions are being propounded to the witness by Mr. Hirsch, Mr. Rogers, one of counsel, notwithstanding the objection of the witness, opens the package and begins to read the contents."

I have made Birmingham my home about eleven years. I never lived here prior to eleven years ago, but I visited Birmingham every sixty or ninety days for a good many years prior to that. Yes, sir, I know Mr. J. C. Mayfield, Sr., and have known him since the early part of the year 1904. Yes, sir; Mr. J. C. Mayfield was present at the time I said I was in the defendant's employ in this case to subpoena witnesses. I don't recollect exactly when it was. I haven't no idea, I have been around the country some—I have no idea. I think it was about March of this year. Yes, sir; I saw Mr. J. C. Mayfield at the time the Commissioner gave the summons to me. No, the

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Commissioner here now taking testimony is not the one, it was another gentleman. I [1380] don't remember his name. I was in Birmingham at the time of the trial of the case of the State vs. Melville Rice and I was in the courtroom when the case was called and Mr. Mayfield put on the stand, but I left the city immediately and went to Norfolk. That was the same Mr. J. C. Mayfield that was put on the stand at that time as the Mr. Mayfield that I saw here when the defendant was taking testimony. I know a colored fellow that I always called "Dick," whose name I have been told is Jas. Dickson. I understood that he was arrested about the time of the trial of the case of the State versus Melville Rice. I found him in jail and I suppose he was arrested. You ask, if as a matter of fact, I found at his house certain material that came from the Celery Cola, or the J. C. Mayfield Manufacturing Company; I think Mr. Bodeker found some things in his house which I identified as the property from this company. You ask if I placed those things in his home; well, I object, I refuse to answer that question. I refuse to answer it on the ground—I refuse to answer it on the ground of incriminating myself.

I worked for the J. C. Mayfield Manufacturing Company and the Celery Cola Company, and, during some litigation that we had at one time while I was in St. Louis, they notified me that I had been elected Vice-President of the Mayfield Manufacturing Company and gave me power of attorney to settle a law-

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suit they had up there, or prosecute it, which I finally compromised without going to trial. I began work for the J. C. Mayfield Manufacturing Company in the early part of 1904, and I was with that company and with the Celery Cola Company until the fall of 1906, I guess it was. My duties with those companies were that I looked after the interests of the company on the outside and sold goods and made some contracts with friends I had made around here, etc., and then, if there was any suing of anyone, or anything like that, I did that, and did the collections. Some of the boys around here would attempt to collect and couldn't do it, they were all turned over to me. For some time I was on the road traveling,—made some trips to the southern part of the state selling goods. That was when they were on 20th Street. Then afterwards I was in St. Louis, I guess possibly a year or a little over. I was there looking after some litigation that I had—infringement of the trade name, "Celery Cola." **[1381]**

You ask if I can name some of the employees that were employed by the J. C. Mayfield Manufacturing Company, or the Celery Cola Company; well, there was Mr. Mayfield's boys, S. T. Mayfield and J. W. Mayfield, and then later on Carl—he was a young boy down on Morris Avenue, he was down there a good deal, but he was young—didn't take any active part in the business. Then Mr. D. E. Moody worked there and Mr. Barclift, I don't know as I ever knew his initials. Then over there on Morris Avenue there was a fellow named Benjamin and a fellow

named Adams, who lives in Columbus, Mississippi. Miss Alice Wheeler also worked there, and there was a bottling plant there that changed hands several times, different people owned it,—but I knew very little about the bottling plant. And some negroes worked around the place. No, sir, Melville Rice never worked on the south side. He worked a short time on Morris Avenue, a short time before I quit. Yes, "Dick" worked there. You ask who else worked at either one of the two places; well, I will tell you, there was nicknames for all of them, there was one white fellow called "Dog Face," I don't know what his name was, and don't know now what his name is.

Mr. DART.—"Here I ask the stenographer to note again that while Mr. Hirsch is asking the witness questions, Mr. Rogers, one of counsel, is examining the papers in the bundle which the witness objected to counsel examining and asked protection against examining, and I protest in behalf of the witness again."

Then there was a boy named Howard Trent and Mr. Garrett was bookkeeper there. Then we had a lot of stenographers, I don't know how many of them. I knew the names of some of them, and of others I did not. They would have some extra work and telephone up town to get a girl and she would work there a short time, and then they had two of the Miss Armstrongs who worked there on Morris Avenue. Then there was a whole lot of bottle washers and boys in there, negroes working there, that I don't recollect the names of. If I would see them I

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would know them, but I don't know the names—we always had nicknames for them. As I understood it the Mayfield Manufacturing Company just prior to 1904 had bought out the Schooler Vinegar Co. You ask if there was a concern in St. Louis, also that Mr. J. C. **[1382]** Mayfield was connected with; as I understood it they had a plant there which Mrs. Brooks and her son and S. S. Jerome were operating under the name of the Celery Cola Company of Missouri, and they made a contract to buy their extracts or syrups from the Mayfield Manufacturing Company, but after they got possession of the plant they procured a formula somewhere and we didn't get any more orders from them. After investigation, we found they were making stuff and selling it as "Celery Cola," and they began writing threatening letters to customers over the country that if they didn't buy from them they would sell—I remember one concern particularly, the Robert Portner Brewing Company. I remember seeing correspondence and all, where Mrs. Brooks threatened that if they didn't buy "Celery Cola" from her she would sell "Celery Cola" under the price they had been buying it at, and that was the cause of the suit being filed there against that company. I finally went up there and the result of it was that we finally made a settlement satisfactory to all parties concerned. The plaintiff in that case was the J. C. Mayfield Manufacturing Company, and the defendant was the Celery Cola Company of Missouri. The case was filed in Judge

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Ryan's court in St. Louis. I guess it was in the latter part of 1905, or maybe the spring of 1906, when it was settled. I don't remember the time exactly. I don't remember exactly when it was that I severed my connection with Mr. Mayfield's enterprise. I don't remember whether it was near Christmas of 1907, or afterwards, in 1908. From 1904 until I severed my connection, the J. C. Mayfield Manufacturing Company manufactured cider and vinegar on South 20th Street, and extracts and syrup for soda fountains and bottlers, then we had a sherbert there — sort of cheap wine or cider which we sold as a sherbert—that was the principal business. Yes, sir, they made "Celery Cola" there and, I understood there was "Pepsin-Ola" made there, but I don't know that of my own knowledge. The Celery Cola Company sold different kinds of bottlers and soda fountain extracts and vinegar, apple cider, those sherberts and "Hop-Ale"—I don't recollect, I think possibly the Mayfield Manufacturing Company sold some "Hop-Ale," but not as much as the Celery Cola Company did after it began operations. **[1383]**

No, sir, I don't remember the names of those extracts and syrup for fountains. You ask if, during the entire time I was connected with the J. C. Mayfield Manufacturing Company, the Celery Cola Company here in Birmingham, or the Celery Cola Company in Missouri, any or either of these concerns made, manufactured, sold, advertised, handled, dealt in or had any advertising matter for, any product

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with the name of "Koke,"—"K-O-K-E?" Well, I was out on the road some, as I stated, and I can't answer that question. You ask if they ever made, manufactured, sold, advertised, or had any labels, containers, barrels, half barrels, kegs, or anything else with "K-O-K-E" on it, as far as I know, at any one of the places, or any of the companies, that I have enumerated heretofore; well, of my own knowledge, I refuse to answer that question—I don't—the position I was in—well, I don't want to answer that question. I was connected with Mr. Mayfield in the capacity there, as I have stated, and, further, he and I had some interests in Tennessee, in an oil field at one time, and, during that time, I attempted to negotiate the sale of some coal lands in Tennessee that he had some interest in, or control over, or something, and I went up to Kentucky with some gentlemen here looking after their oil interests, and I was in Nashville a good deal trying to do something with this coal. While in St. Louis looking after this lawsuit, I received a great deal of correspondence from Mr. Mayfield and I talked to him a great deal over the telephone about it. As I remember it, Mr. Mayfield wrote his attorney there and gave me a letter of introduction to him. I was not an attorney, but I went there as a sort of detective to see if I couldn't get at the bottom of the thing and see what amount of goods they had been selling, so that we could make some basis of complaint as to the amount that they really owed us. It was hard to get at, but I finally

(Deposition of Charles J. Pogue.)

succeeded, I think, in doing that.

Mr. HIRSCH.—"Now, Mr. Dart, you can make a note in the record that Mr. Hirsch is examining the package of papers. I now make the statement for the record that I am examining the papers produced by Mr. Pogue under the subpoena *duces tecum.*"

The WITNESS.—"I wish you would make a note there that I object to him examining it." [1384] The attorney I mentioned awhile ago in St. Louis, to whom Mr. Mayfield gave me the letter of introduction, was the City Attorney at that time, Thomas L. Anderson—he's now Judge there, appointed Judge there recently, as I understand.

Mr. DART.—"Inasmuch as we have no way of protecting the witness, or of having this question tested immediately while the gentlemen are searching the private papers of the witness, we wish to put on the record an objection that this is not rebutting testimony, and that no foundation has been made for the present remarkable proceeding."

Mr. HIRSCH.—"Put down in the record that Mr. Pogue is examining the papers before counsel is doing so."

The WITNESS.—"And I object to doing so, and I object to the papers being presented in this Court."

Mr. DART.—"Please note on the record that the examination he is now making was after Mr. Rogers had made quite an extensive examination, which extended during the whole period the witness was under examination by Mr. Hirsch, and that Mr. Hirsch

made some examination before he invited the witness, in answer to his last protest, to come and separate his private personal papers."

(The witness was directed to go through the package of papers and pick out such as had no reference to the subject matter of this litigation and retain the same; and such as referred to the subject matter in question to be set apart to be used by counsel. The witness proceeded to sort out the documents as stated, after which examination proceeded as follows, to wit:)

I haven't any idea in the world how many letters, papers and things I think I have examined. I imagine it is a hundred or more. I noticed the printed matter on the letters or documents as I was running through. No, sir, the name "Koke,"—"K-O-K-E" did not appear on a single solitary one of them. "Celery Cola" appeared on some of them, and some of them were just blank paper. "J. C. Mayfield Manufacturing Company" was on some of them and "Celery Cola Manufacturing Company" was on others. Plaintiff's Rebuttal Exhibit #11 is a list of the stockholders of the Celery Cola Company as they appeared on the [1385] books of that concern. I don't know what the shares were or who were the stockholders, personally. I received the letter signed "J. C. Mayfield," addressed to "Dear Pogue," dated December 15, 1905, which is filed as Plaintiff's Rebuttal Exhibit #12. That is J. C. Mayfield's signature to that letter. The letter dated

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December 18, 1905, signed by "F. T. F. Johnson" and addressed to "J. C. Mayfield, Esq., Birmingham," being Plaintiff's Rebuttal Exhibit #13, was sent to me by Mr. Mayfield enclosed with Plaintiff's Rebuttal Exhibit #12. There was some stationery printed here in June like Plaintiff's Rebuttal Exhibit #12, and then there was a lot of other stationery "Mayfield Manufacturing Company," and also some of the Celery Cola Company. The letter from "J. C. Long, chemist," addressed to "Chas. J. Pogue" at St. Louis, being Plaintiff's Exhibit #14, was received by me, and, also, I talked to Mr. Long. I received the letter which says "Dear Pogue" and is signed "J. C. M.," being Plaintiff's Rebuttal Exhibit #15. Now, as for this envelope in which the letter is, there was a whole lot of envelopes around there—there was some, as I remember it, that had "Detroit, Michigan," printed on it, and some of them had "St. Louis, Missouri," on them. They had some that had the same kind of heading on them, "Celery Cola." That letter, Rebuttal Exhibit #15, was written by Mr. J. C. Mayfield, Sr. The letter dated April 22d addressed to "Dear Pogue" being Plaintiff's Rebuttal Exhibit #16, is a letter-head which I received at St. Louis. They used some of these for Celery Cola, too, they had some lithographed that had "St. Louis" printed on them, and they would stencil "Birmingham" across them sometimes. That letter seems to be just a part of one written by Mr. Mayfield. The letters dated June

(Deposition of Charles J. Pogue.)

15, 1906, signed "J. C. Mayfield," and addressed to "Dear Mr. Pogue," being Plaintiff's Rebuttal Exhibit #17, was a letter-head that was used by the Celery Cola Company, but the officers were changed there later on. I don't remember whether the letter-heads showed the change or not—Moody, Secretary, or Secretary and Treasurer, I don't remember. Yes, sir, I received that letter and that's Mr. Mayfield's signature to it. The telegram and the envelope in which it is enclosed from J. C. Mayfield to C. J. Pogue sent from Dallas, Texas, to P. O. Box #1228, [1386] St. Louis, Missouri, both the telegram and envelope being filed as Plaintiff's Rebuttal Exhibit #18, were received by me. I received from Mr. Mayfield right after I arrived in St. Louis the letter dated May 21, 1905, addressed to "Dear Pogue" and signed "J. C. M." on the stationery of the J. C. Mayfield Manufacturing Company, Birmingham, Ala., being Plaintiff's Rebuttal Exhibit #19. I received the letter in the envelope addressed to Mr. Thomas L. Anderson, St. Louis, Missouri, on which envelope appears "J. C. Mayfield Manufacturing Company, 'Celery Cola,' Kansas City, Missouri," which letter and envelope are filed as Plaintiff's Rebuttal Exhibit #20. They used these envelopes sometimes, and had something like that, with different cities, some had Detroit, some had St. Louis—a whole lot of them were left over in St. Louis, and they shipped a lot of them down to Birmingham to use. Mr. Anderson delivered this letter to me after he broke it open and read it. I received the letter

(Deposition of Charles J. Pogue.)

addressed to "Mr. J. Mayfield" with a letter therein signed "J. C. Mayfield" to "Mr. C. J. Pogue, St. Louis," dated May 20, 1905, on letter-head reading, "J. C. Mayfield" with "Celery Cola" thereon, being Plaintiff's Rebuttal Exhibit #21. I registered under the name of "J. Mayfield" when I first went to St. Louis—hadn't given them my real name—thought I would do some detective work. I received the envelope addressed to "Charles J. Pogue, St. Louis, Missouri," with printing on it, "J. C. Mayfield Manufacturing Company, Celery Cola," care of Thomas L. Anderson, with a letter therein, dated "Birmingham, Ala., December 19, 1905," signed "J. C. Mayfield," which letter and envelope are filed as Plaintiff's Rebuttal Exhibit #22." Yes, sir, I received the telegram filed as Plaintiff's Rebuttal Exhibit #23 and I also had a paper somewhere giving me authority to exercise my own judgment. Plaintiff's Rebuttal Exhibit #24 is a letter-head used by the Celery Cola Company of Missouri,—Mrs. Brooks and her son, E. J. Brooks and Jerome. I received the telegram directed to "Charles J. Pogue, St. Louis" from "J. C. Mayfield," which is filed as Plaintiff's Rebuttal Exhibit #25. I received the envelope and letter filed as Plaintiff's Rebuttal Exhibit #26, the envelope being addressed to "Mr. Charles J. Pogue, St. Louis, Missouri, P. O., Planters Hotel," and having on it "J. C. Mayfield Manufacturing [1387] Company, "Celery Cola." This was some of the stationery in use by the J. C. May-

(Deposition of Charles J. Pogue.)

field Manufacturing Company at that time. They also used a lot of old ones that we shipped from St. Louis,—this has St. Louis marked on it. This letter-head was printed here in Birmingham and was used there with some of the other letter-heads, some of this one and some with "Celery Cola" letter-heads. Yes, sir, I receiver that letter. I don't recollect what the letter dated December 15, 1905, signed by the Tennessee Carbonator and Supply Company, filed as Plaintiff's Rebuttal Exhibit #27, is. I don't recollect what that is. I received the letter addressed "Dear Pogue" and signed "J. C. Mayfield," being Plaintiff's Rebuttal Exhibit #28. I note it was returned to Birmingham, and I suppose I took it up and credited them with it and returned it to Birmingham, on account of it being damaged in some way—I don't recollect, I don't know that it is. Mrs. Brooks told me the prices she quoted the Brewing Company, and intended to go out on the road and sell it to anyone she wanted to. The letter-head as shown by Plaintiff's Rebuttal Exhibit #29 was used by the J. C. Mayfield Manufacturing Company there and also the "Celery Cola" letter-head, and sometimes, some of the letter-heads were steel engraved, like that on the envelope from St. Louis,—shipped from St. Louis with "St. Louis" printed on it. That had St. Louis on it—that was the only difference, and some of them were printed and some lithographed. I received the letter in the envelope directed to "C. J. Pogue, Birmingham," in the left-hand corner of which envelope is "return to J. C.

(Deposition of Charles J. Pogue.)

Mayfield, Vandervilt Building, Nashville," which letter and envelope are filed as Plaintiff's Rebuttal Exhibit #30. My recollection is this letter was mailed to Mr. Garrett in the envelope, with a letter to him, and then handed to me. Plaintiff's Rebuttal Exhibit #31 is a cut of Mayfield Manufacturing Company that they used when I first went there, and then they changed it when they moved to Morris Avenue. They changed it to 2112 Morris Avenue, and the cut was used at St. Louis. Plaintiff's Rebuttal Exhibit #32 is one of the shipping tags that was used for tacking on barrels of "Hop Ale." I received the letter in the envelope addressed to "C. J. Pogue, St. Louis, Mo.," being Plaintiff's Rebuttal Exhibit #33. **[1388]**

It is a copy of a letter Mrs. Brooks wrote to the Robert Portner Brewing Company of Danville, Virginia, and she told me that she had written them too and she told me she was going to sell these goods wherever she pleased. That was before we forced a settlement—settled the case. I received the letter and envelope filed as Plaintiff's Rebuttal Exhibit #34. The envelope has on it the address, "J. J. Pogue, St. Louis, Mo.," and printed on the envelope "J. C. Mayfield Manufacturing Company, Celery Cola." Inside is a letter to "Dear Pogue" not dated, signed "J. C. M." This was old letter-heads that we shipped here from St. Louis with Kansas City on it—there is a whole lot of it there. Plaintiff's Rebuttal Exhibit #35 is an envelope with a

(Deposition of Charles J. Pogue.)

letter therein. The envelope is addressed to "C. J. Pogue, St. Louis, Mo.," and has on it "St. Louis, Mo., Celery Cola." That's the envelope used in St. Louis and a lot of them were stamped "Birmingham" that were shipped from St. Louis to Birmingham. The letter inside this envelope is addressed to "Dear Pogue" and is signed "J. C. M." It is from J. C. Mayfield, and I received it. The envelope filed as Plaintiff's Rebuttal Exhibit #36 was in use in St. Louis, and there was a lot of that here, and sometimes they would pick them up and use them,—I am not positive, but I think I shipped some here myself. I received Plaintiff's Rebuttal Exhibit #37, which is addressed to "C. J. Pogue, St. Louis." On the envelope is "J. C. Mayfield Manufacturing Company, Celery Cola"; the letter inside is dated "May 25, 1905," and signed "J. C. M." On the stationery is "J. C. Mayfield Manufacturing Company, Manufacturers of Celery Cola." This is one of the letter-heads which the J. C. Mayfield Manufacturing Company used. I don't remember when the Celery Cola Company was organized, but they had "Celery Cola" letter-heads, too, and these are some of the old envelopes. I don't recall that the J. C. Mayfield Manufacturing Company had any other kind of stationery besides that, except that it had different localities printed on it, and except, possibly, that some was engraved and some was merely printed, and I don't recollect any other kind of stationery that the Celery Cola Company had.

(Deposition of Charles J. Pogue.)

Plaintiff's Rebuttal Exhibit #38 is one of the old letter-heads of St. Louis. **[1389]**

A lot of them were shipped down here and stamped "Birmingham"; the letter is notifying me, as district salesman, that they had just received a car-load of pure apple cider. The letter is from J. C. Mayfield. Plaintiff's Rebuttal Exhibit #39 is one of the old St. Louis letter-heads, and the letter is from him to me wanting me to go to St. Louis that night. Plaintiff's Rebuttal Exhibit #40 is a letter written by J. C. Mayfield, Sr., giving me authority to give bond for the Mayfield Manufacturing Company,—I don't think it was drawn legally. Plaintiff's Rebuttal Exhibit #41 is a letter addressed to J. W. Adams and C. J. Pogue, at Columbus, Mississippi. On the envelope is "J. C. Mayfield Manufacturing Company, Celery Cola." On the letter inside is "J. C. Mayfield Manufacturing Company, Celery Cola," and the letter is dated November 16, 1904, addressed to "Dear Mr. Pogue," and signed by "J. C. Mayfield." This is the letter-head and the envelopes,—old St. Louis letter-heads and envelopes that they used there and stamped "Birmingham" on them. It is from J. C. Mayfield. I would like to say about this letter right here, I remember that letter, and it was in reference to "Hop Ale" that was shipped to Columbus, Mississippi, and the prosecuting attorney there under the laws claimed that there was a little too much alcohol in it—we had no trouble with it here—that's what it was.

(Deposition of Charles J. Pogue.)

I received Plaintiff's Rebuttal Exhibit #42. The envelope is addressed to "Mr. Charles J. Pogue," and on the envelope is printed among other things, "J. C. Long Laboratory." I received that from Long. I requested him before I left Birmingham to write me. I received Plaintiff's Rebuttal Exhibit #43 from Mr. J. C. Mayfield. It is addressed to "Dear Pogue," signed "J. C. M." dated January 11th,—or first, I can't tell exactly which,—1906. I told Mr. Mayfield over the phone once or twice when he wrote me important letters to send them by express, that they had sort of gotten on to me doing some work and I was afraid they would get on to the mail. I received Plaintiff's Rebuttal Exhibit #44. Mr. J. C. Mayfield, President of the J. C. Mayfield Manufacturing Company gave me that authority, appointing me City Salesman and authorizing me to make collections and contracts. I don't know what Plaintiff's Rebuttal Exhibit #45 is, [1390] but it's a blank torn out of one kind of an old order book that J. C. Mayfield Manufacturing Company used to use,—I don't know how it ever came into my possession. I don't know anything about it, don't know what it is, but they had some old order books around there, some of them with blanks. I received Plaintiff's Rebuttal Exhibit #46, from J. C. Mayfield. The envelope is addressed to "Honorable J. C. Pogue, St. Louis," and there is printed on there "Celery Cola, Extracts, Soda Water Supplies." The letter inside has printed on it "Celery Cola" and is addressed to "Charles J. Pogue, St. Louis, Dear Mr. Pogue," and is signed "J. C. May-

(Deposition of Charles J. Pogue.)

field." I received Plaintiff's Rebuttal Exhibit #47 and enclosures. The envelope is addressed to "Charles J. Pogue, St. Louis," and has printed on it "Celery Cola Company." On the inside are two labels and a letter on "Celery Cola" stationery, dated "Birmingham, Alabama, April 3, 1909" to the Bay City Bottling Works, Bay City, La., signed "Celery Cola Company by J. C. Mayfield," and inside of it seems to be printed advertisement. In the same envelope there is another letter to C. J. Pogue from Mayfield dated 4/2/06, printed "Celery Cola, Extracts." Inside the envelope also is a return envelope on which is printed "Celery Cola Company, Birmingham, Ala., 2114–2116 Morris Ave." I received from Mr. J. C. Mayfield, Plaintiff's Rebuttal Exhibit #48, being a letter addressed to "Charles J. Pogue, St Louis, Mo., Planters Hotel." On the envelope there is printed "J. C. Mayfield Manufacturing Co., Celery Cola" and stamped with "Birmingham, Ala." The letter inside is on "J. C. Mayfield Manufacturing Company" stationery dated "Birmingham, Ala., May 20th" and addressed to "C. J. Pogue" and signed "J. C. Mayfield." I received from Mr. Mayfield Plaintiff's Rebuttal Exhibit #49. The envelope is addressed to "C. J. Pogue, St Louis, Mo." and has printed thereon "J. C. Mayfield Manufacturing Company" and "Celery Cola, Kansas City, Mo." with "Birmingham, Ala." stamped over it. The letter inside is dated January 12, 1906, is addressed to "Dear Pogue," and is signed "J. C. Mayfield." Plaintiff's Rebuttal Exhibit #50 is an envelope ad-

dressed to "C. J. Pogue, St. Louis, Mo., P. O. Box #1238" in the top of which is printed "Celery Cola Company, Extracts and soda fountain supplies" addressed "Birmingham." Inside said envelope is a letter addressed to "Dear Pogue" signed "J. C. M." and it is printed "Celery Cola [**1391**] Birmingham, Ala." That's one of the loose leaf sales sheets of the Celery Cola Company,—that's the Celery Cola letter-head. Plaintiff's Rebuttal Exhibit #51 is a list of the parties that Mr. Baxter gave me that formerly worked for the Mayfield Manufacturing Company at 18th and Olive Streets, St. Louis, Mo. It is what he told me was the weekly pay-roll. I got it for the purpose of securing some evidence from these parties in a suit we had against the Celery Cola Company of Missouri and I had no idea I had it in my possession. Plaintiff's Rebuttal Exhibit #52 is a letter which I received from Mr. Mayfield with that list of stockholders of the Celery Cola Company in it. The letter is written on the stationery of the Mayfield Oil Company, Nashville, Tenn. I received Plaintiff's Rebuttal Exhibit #53 from Mr. Mayfield. It seems to be a letter dated August 25, 1906 to Mr. Charles J. Pogue from Mr. J. C Mayfield on stationery of the "J. C. Mayfield Manufacturing Co." I had contracted for some coloring from Canfield there. He had made some shipments and they had turned out to be worthless and he was writing and telling me they were absolutely worthless. Plaintiff's Rebuttal Exhibit #54 is a letter-head that was used by the Celery Cola Company. Plaintiff's Exhibit #55 is

(Deposition of Charles J. Pogue.)

some of the old St. Louis Mayfield Manufacturing Company's letter-heads that were shipped down here and sometimes stamped "Birmingham" over them. I received Plaintiff's Rebuttal Exhibit #56 from Mr. Mayfield. It is a letter, the envelope of which is addressed to "Charles J. Pogue, St. Louis, Mo., P. O. Box #1238," and having printed thereon "J. C. Mayfield Manufacturing Company, Celery Cola, Kansas City, Mo.," and having stamped over the "Kansas City, Mo.," "Birmingham, Ala." Inside is a letter addressed to "Dear Pogue" and signed by "J. C. Mayfield." Plaintiff's Rebuttal Exhibit #57 consists of six letters each one of which is addressed "to Whom it May Concern." I was going to be up among strangers and so I saw some of these gentlemen and asked them to give me some letters from friends of mine to show to these strangers. That was not during the time I was working for the Celery Cola Company; it was afterwards, in 1910. I received Plaintiff's Rebuttal Exhibit #58 from Mr. Mayfield. The envelope is addressed to "Charles J. Pogue, St. Louis, Mo." is printed "J. C. Mayfield Manufacturing Company, Celery Cola, Kansas City, Mo." and stamped "Birmingham, Ala." [1392] In said envelope is a letter from the J. C. Mayfield Manufacturing Company to A. Busch Glass Company, St. Louis, Missouri, on the "J. C. Mayfield Manufacturing Company" stationery, dated "Birmingham, December 21, 1905." Plaintiff's Rebuttal Exhibit #59 being a letter dated New York, December 13, 1905, evidently addressed to J. C. Mayfield and signed "Britton" is

(Deposition of Charles J. Pogue.)

a letter that was sent to me by Mr. Mayfield in one of his letters and I think I wrote to Mr. Britton that we didn't know for certain when the case was coming up. We wanted him to come over there to the trial as one of the witnesses. I received Plaintiff's Rebuttal Exhibit #60 from J. C. Mayfield. It is a letter addressed to "Dear Pogue" and is signed "J. C. M." In so far as I know, neither the J. C. Mayfield Manufacturing Company nor the Celery Cola Company either of St. Louis or Birmingham used any different kinds of stationery other than that identified by me except that there was a change of the location both as to the cities and where located in said cities. These letters show, as I have stated, that I was away from there a great deal of the time. No, sir, there is not a single letter that I have examined that has got the name "Koke,"—"K-O-K-E" on it, or in it. That includes those I have identified for this record and those I have examined here, but which have not been put into this record.

(Plaintiff here tendered and offered in evidence Plaintiff's Rebuttal Exhibit Nos. 11 to 60, inclusive.)

(Defendant objected to the introduction of each of said exhibits, because irrelevant and immaterial and because they are unsworn hearsay statements and because not proper rebuttal evidence. Objection overruled. Exception.)

(The witness, Charles J. Pogue, having claimed his attendance fee of $1.50, same was paid him by counsel for the plaintiff and the receipt evidencing such payment was tendered in evidence by counsel

(Deposition of Charles J. Pogue.)

for plaintiff and was duly identified by the Commissioner, bearing the date and signature of the the Commissioner attached thereto.)

(There was no cross-examination of this witness.)

Deposition of J. T. Stallings, for Plaintiff, In Rebuttal).

J. T. STALLINGS.

Direct Examination by Mr. HIRSCH.

I live in Birmingham, Ala. I am official stenographer of Jefferson County, Ala. I am a regular official court stenographer [1393] elected by the Judges of the Courts. I reported a case known as The State versus Melville Rice, heard in the First Division of the Inferior Court of Birmingham, before J. H. Bonner, on August 7, 1907. A witness named J. C. Mayfield was sworn on that trial in the case mentioned. My best recollection is that he was sworn, I wouldn't like to swear positively, it has been a good while ago. Yes, sir; he was cross-examined by counsel for the defendants, Allen & Bell, of Birmingham. Plaintiff's Rebuttal Exhibit #3 is a transcript of Mr. Mayfield's testimony taken at that trial and was prepared by me from my stenographic notes that were taken down at the trial. It is a correct transcript of the record, as reported by me, to the best of my ability, and is complete. I gave a transcript of that record taken from my stenographic notes to Mr. Allen, the attorney for the Defendant. I transcribed the notes myself, is my recollection. I

(Deposition of J. T. Stallings.)

placed this certificate on there at the end of the testimony.

Cross-examination by Mr. LITTLETON.

Plaintiff's Rebuttal Exhibit #3 is a transcript of Mr. Mayfield's testimony only, and is not a complete transcript of all the evidence taken on the trial of that case. The other witnesses examined at that trial, were A. M. W. Parsons, S. T. Mayfield, George H. Bodeker, for the State and Dr. Oscar Hayes, for the Defendant. I have a copy of the complete transcript of all the testimony in my possession. I don't know that I am able to state how that case terminated. I wouldn't like to state positively that the defendant was bound over to the Grand Jury, without referring to the Record.

Redirect Examination by Mr. HIRSCH.

Yes, sir, I was subpoenaed to come here, and I was asked by representatives of the Coca-Cola Company to make a transcript of this record, and I did make it for the Coca-Cola Company. I would be glad to get my per diem fee as a witness. I also made a complete transcript of all the evidence taken in that case for the Coca-Cola Company. The transcript of the entire evidence I charged $24.00 for, which has not been paid me, and for the certified copy of Mr. Mayfield's testimony I made a charge of $18.00. I claim my attendance fee of $1.50 for attendance here, and have no traveling expenses. [1394]

Mr. HIRSCH.—"I present you here the $42.00 in payment of bill for making up the transcript, Mr. Stallings, and $1.50, as your witness fee."

(Deposition of J. T. Stallings.)

(Plaintiff here tendered and offered in evidence as Plaintiff's Rbuttal Exhibit #4, the transcript of the record made by the witness J. S. Stallings,—it was tendered as a whole and each question and answer was tendered as a separate exhibit by itself, being collectively and separately tendered under the collective Number 5, as an admission on the part of Mayfield and also for the purpose of impeachment.)

Mr. HIRSCH.—I request Mr. Littleton, Counsel for the Defendants in this case, to have Mr. J. C. Mayfield, Sr., here for the purpose of giving him the privilege and opportunity of saying whether this is true or not.

(Plaintiff here tendered and offered in evidence as Plaintiff's Rebuttal Exhibit #6, the entire transcript of the record in the case of State versus Melville Rice, which includes testimony of all the witnesses examined at said trial, in addition to which each question and answer in said transcript is tendered as an exhibit under the collective number 7, each question and answer tendered as a separate exhibit. Plaintiff also tendered and offered in evidence as Plaintiff's Rebuttal Exhibit #8, the transcript of the Criminal case of the State versus Rice and also as Plaintiff's Rebuttal Exhibit #8, a certified copy of the transcript of the State of Alabama versus Melville Rice, which shows the disposition of the case; and also the transcript of the same case, as Exhibit No. 8, being a certified copy of the findings of the Judge thereon. As Plaintiff's Rebuttal Exhibit #9, the subpoena issued to J. T. Stallings, and receipts

(Deposition of J. T. Stallings.)

showing payment of the two bills for making transcript of the evidence were offered in evidence as Plaintiff's Rebuttal Exhibit #9.)

(Defendants object to the introduction of the document tendered as Plaintiff's Rebuttal Exhibit #3 on the ground; first, that it is not proper Rebuttal evidence; second, that no foundation was laid for the introduction of the same; third, that a complete transcript of the evidence in that case embodying the entire testimony of J. C. Mayfield, has been filed as an exhibit herein and the filing of this additional transcript is just piling up the costs; fourth, that said document is [1395] incompetent, irrelevant and immaterial. The same objection was made to the introduction of Plaintiff's Rebuttal Exhibits Numbers 4 to 8, inclusive. Objections overruled. Exception.)

(Plaintiff here tendered and offered in evidence a printed document,—appears to be a circular,—as Plaintiff's Rebuttal Exhibit #10.)

(Defendants object to the introduction of Plaintiff's Rebuttal Exhibit #10, because it is irrelevant, immaterial and incompetent, second because not properly proved, third because not proper rebuttal evidence, no foundation having been laid for it in the cross-examination of the witness sought to be impeached. Objection overruled. Exception.)

Redirect Examination by Mr. HIRSCH.

I furnished the transcript of the evidence in the case referred to about two weeks ago, I should say. I refer to Plaintiff's Rebuttal Exhibit #6. I fur-

(Deposition of J. T. Stallings.)

nished Plaintiff's Rebuttal Exhibit #4 today, June first. I was first approached about these Exhibits about six weeks or two months ago.

Deposition of David Earl Moody, for Plaintiff (in Rebuttal).

DAVID EARL MOODY.

Direct Examination by Mr. HIRSCH.

I reside at Oneonta, Alabama, which is about 36 miles from here. I have been there six years last Christmas. Before that I lived in Birmingham. I am 45 years of age. I know Mr. J. C. Mayfield, Sr., Mr. Steve Mayfield, J. C. Mayfield, Jr., and Mr. Will Mayfield. I got acquainted with Mr. J. C. Mayfield, Sr., about the latter part of 1903 or the first part of 1904. I bought a third interest in a bottling plant over on Powell Avenue and 20th street in the latter part of 1903 and Mr. Mayfield shortly after that visited that place and I got acquainted with him. B. U. Hopper and John P. Ensley were interested with me in that bottling plant. We called it the Celery-Cola Co. I sold my interest along in the summer of 1904 to a Mr. Keller. Yes, sir, I was at one time a salesman for the Celery-Cola Company. Plaintiff's Rebuttal Exhibit #61 is one of the cards I used,—some just like it. You ask what the Celery-Cola Company manufactured; which one do you have reference to? [1396] The one I worked for after I sold out? Well, they manufactured several brands of drinks over there; namely, Celery-Cola Extracts and syrup and later on a general line of soda-water, ginger-ale

(Deposition of David Earl Moody.)

and vinegar, I believe, and Pepsin-Ola Extract. You ask whether I was familiar with the brands that were sold by that Celery-Cola Company; I was familiar with all the brands I sold, yes, sir. No, sir, I never heard of any drink being manufactured, sold or advertised or any syrup that was called or labeled or branded or stencilized "K-O-K-E." I found a letter-head or two, or a billhead or two, in my files and brought them with me. These two letter-heads marked Plaintiff's Rebuttal Exhibit #62 and #63 are the only ones particularly that I could find. At that time Mr. J. C. Mayfield was President of the Celery-Cola Company for which I worked and one of the other boys was vice-president,—the letter-heads show, I don't know just exactly. I was with the Celery-Cola Company about three years and a little better. I went to work sometime in the summer of 1904 and worked for them on up until the latter part of the year, 1907. Yes, sir, I have seen Plaintiff's Rebuttal Exhibit #64, that's my handwriting. I have a book with me that's similar to that. The Celery-Cola Company, which I was partly interested in, ran a bottling plant and we bottled some of Mr. Mayfield's Celery-Cola and then we put up a general line of soda-wate and Ginger-Ale.

Cross-examiation by Mr. LITTLETON.

I moved to Birmingham about the first of March, 1901. I ran a general mercantile business. I quit them because it wasn't satisfactory, no money in it. I made a failure of that business. After that I moved to Avondale in 1902 and established a little

(Deposition of David Earl Moody.)

mercantile business over there on the corner of East Lake car line and Spring Street. I had taken sick and my father sold out the business in about six months. After that I moved to Hoff, ten miles from Birmingham, and went in the truck farming business for one year. I moved back to Birmingham here in the fall of 1903 and bought an interest in the Celery-Cola Bottling plant. My recollection is that I paid them a thousand dollars for that interest. I believe I gave the check to Mr. B. U. Hopper. Hopper and Ensley had just bought it, along in the fall, and sold me an interest. At the time I made the trade with them the plant **[1397]** was over on Powell and 20th St. It was not moved as long I had an interest in it. Later Mr. Mayfield got hold of my interest in it,—I first sold to Mr. Keller and he couldn't pay for it and I had to take it back and then resold it to Mr. Mayfield,—and he went into the bottling business, that is, he took my interest, and finally it was all moved over to Morris Avenue. At the time I was conducting this bottling establishment I bought the Celery-Cola extract from Mr. Mayfield. We bottled a general line of soda-water, strawberry, lemon,—we didn't make any vinegar, Mr. Mayfield had charge of that part of it. After Mr. Mayfield moved over to Morris Avenue the name was changed from the J. C. Mayfield Manufacturing Company to the Celery-Cola Company,—that was while I was traveling for it,—and that is the other Celery-Cola Company I mentioned a while ago. The principal territory I traveled was within a radius of one hundred miles of

(Deposition of David Earl Moody.)

Birmingham. I made one or two trips into Columbus, Mississippi, and one or two into Atlanta. Yes, sir, I was constantly on the road during that time. No, sir, I have never traveled before on the road as a salesman. Yes, sir, I was selling principally the Celery-Cola, that was the kind I was pushing, Celery-Cola, Vinegar, and Cider. I pushed Hop-Ale more than anything else along towards the windup. I made a specialty of the Hop-Ale, and sold more of that than anything. You ask how many brands of vinegar they were making; why, the only kind that was ever given me to sell was the white wine and pure apple vinegar,—two brands of vinegar. You ask if it would surprise me to know that there were four brands of vinegar made by the Company; I never saw but two. They made three brands of cider that I remember of, grape, peach, apple. I do not remember the fourth one, if they had more than three, I don't remember it, possibly they had some cherry, I believe they did have some cherry. In addition to that they sold some Pepsin-Ola Extract,—very little of that,—a good deal of Hop-Ale, Ginger-Ale, and they rectified some stuff over there, sold some rectified stuff over there called "Kidney Cure,"—Gin and Buchu. I couldn't tell you what that "Kidney Cure" was, I wasn't compounding none of it. I know some of the ingredients they put into it, but I don't know what all they did put in. No, sir, I had nothing to do with the manufacture of any of these specialties, [1398] which either the Mayfield Manufacturing Company or the Celery-Cola Com-

(Deposition of David Earl Moody.)

pany were getting out. I was merely a salesman and had nothing to do with the laboratory end of it, I passed through the laboratory occasionally, but not often. I don't know of my own knowledge all the things that were being made there and I don't pretend to testify positively as to everything that was made there. I only know the things given me to sell. And if they made anything else there, any other product under any other name, if it didn't happen to be given me to sell, why, of course, I didn't know about that. No, sir, I don't know anything about the business in which J. C. Mayfield, Sr., or any of the Mayfields was engaged in in Nashville, Tenn., and I know nothing of any business any of them was engaged in in St. Louis. No, I do not know of my own knowledge whether or not J. C. Mayfield, Sr., or any of the other Mayfields made up the Celery-Cola Extract, out of which the Celery-Cola Syrup was prepared, in Birmingham, Nashville, or St. Louis. You ask what class of trade I usually called on in selling vinegar, Hop-Ale and Celery-Cola; in selling the Celery-Cola we called on the bottling trade and also the soda-fountain trade. No, we did not sell Hop-Ale or vinegar to the soda-fountains. When we went to sell the vinegar and the cider we called on the grocery trade and we sold the Hop-Jack principally to the blind tigers,—yes, you might term them blind tigers. You ask if I can recall the names of any of the soda-fountains to which I sold any of the products of any of these companies at any time; well, I sold a half barrel in 1909 to Hearn at Russellville, is my recol-

1885

(Deposition of David Earl Moody.)

lection. Yes, sir; I was working for the Celery-Cola Bottling Company in 1909 at Birmingham, but that was after it had changed hands again. Now, let's see, I remember selling some to the East End Drug Company out here on the Avondale car line about 28th Street. I couldn't tell you the time when the sale was made, but it was sometime when I was traveling. It was not in 1901 because I was not traveling for them then. I couldn't tell if it was in 1902. It was not in 1903. I don't remember whether it was as late as 1909. I think the quantity sold was either a five or ten-gallon keg. A dollar a gallon was the regular price. Sometimes they cut the price. He might have got it for a little less, I couldn't say. **[1399]** I couldn't tell you the member of the concern to whom I talked when I made the sale. No, sir, I do not remember that the keg was delivered; I don't remember anything about the delivery of it. I just went around and took the order for it. I also sold some to the Bottling Works up here at Atlanta and I sold some to B. T. McGraw Bottling Works at Gadsden,—I don't remember the style of the firm name, but B. T. McGraw was the proprietor at that time. I also sold some to a drug-store at Attala,—I believe the Risckles Drug Company was the style of the firm,—and I sold some to a drug-store at Piedmont,—I can think of several of them if you can give me time to study them up, but I can't recall them right off the reel. You ask if it isn't a fact that my duties with this concern we were talking about only required me to sell to bot-

(Deposition of David Earl Moody.)

tlers and grocery stores and things of that kind and that Steve Mayfield was the Company's salesman who called mostly on the soda-fountain trade; when I made the trade with Mr. Mayfield, my duties with regard to that wasn't specified,—just who I should call on, either soda-fountain or bottling works,—just where I could find that kind of business. I called on them all where I went, where I thought I would get any business. You ask how many Cola drinks there were on the market in Birmingham at the time I was in the bottling business, with the Celery-Cola Bottling Company; why, at that time Mr. Peck was manufacturing a drink over here which he called "Rye-Ola" and there was a "Wise-Ola" Bottling Plant,—those two are the only ones that I remember at that time.

(Plaintiff objects to the question and answer as being improper form of cross-examination and because the direct examination did not cover this subject and because the same is immaterial and brings out matter that was not brought out on direct examination. Objection overruled. Exception.)

Yes, sir; I remember about "Ala-Cola," also, and there was one at Bessemer,—I had forgotten about that. (Same objection for plaintiff. Overruled. Exception.) No, sir; I do not know, and did not know Hubert (Houppert). I have met Mr. Smyly. You ask if I ever heard of a product in Birmingham called "Dope"; why, later on I did,—not right at the time I was working over there, but later on I heard they were [**1400**] manufacturing stuff

(Deposition of David Earl Moody.)

called "Dope." (Same objection by plaintiff. Overruled. Exception.) No, sir; I do not know how many Cola drinks there are on the market today in Birmingham. (Same objection by plaintiff. Overruled. Exception.) You ask if I am connected with any Cola drink concern now; I have been making a drink I call "Queen-Ola," up until last Fall. This wave of prosperity just about knocked me out. (Same objection by plaintiff. Overruled. Exception.) I have been making it some three or four years. (Same objection by plaintiff. Overruled. Exception.) Yes, sir; that is a syrup for making a soda-fountain beverage. (Same objection by plaintiff. Overruled. Exception.) You ask if I sell it to the soda-fountain trade as well as to bottlers; I have sold it to a few bottlers. (Same objection by plaintiff. Overruled. Exception.) I don't call it a cola beverage, I call it "Queen-Ola." I don't know, sir, that it belongs to that same general color. I know the color of the drink but it's a peculiar color of its own. I color it artificially with caramel. (Same objection by plaintiff. Overruled. Exception.) You ask if it is a light or a dark color; I call it tolerably dark. (Same objection by plaintiff. Overruled. Exception.) It is darker, some, than "Coca-Cola." No, sir; it is not near the same color, it's darker. (Same objection by plaintiff. Overruled. Exception.) No, sir; it isn't jet black, but it's darker than "Coca-Cola." (Same objection by plaintiff. Overruled. Exception.) I don't bottle it and never did. I sold it in the syrup form and I

(Deposition of David Earl Moody.)

believe I sold it to about two or three bottlers and possibly that many soda-fountains. (Same objection by plaintiff. Overruled. Exception.) I am not selling it at all now, I am out of business. No, sir; I did not sell it to any of the bottlers in Birmingham. (Same objection by plaintiff. Overruled. Exception.) I have seen it in bottles at the plant where it is bottled. (Same objection by plaintiff. Overruled. Exception.) Some of the bottles were green and some were flint white bottles,—common cap soda-water bottles, seven or eight-ounce bottle. (Same objection by plaintiff. Overruled. Exception.) It was the shape of the regular soda-water bottle. (Same objection by plaintiff. Overruled. Exception.) You ask how its general shape, size and general design compared with the size, shape and general design of the Coca-Cola bottle; **[1401]** Mr. Bodeker saw me about a month or more ago. I made a statement to him then about practically what my testimony would be in this case. No one else saw me with reference to this testimony. I couldn't say whether or not my drink has ever been substituted for any of these other drinks. (Same objection by plaintiff. Overruled. Exception.) I got the formula for my drink at various places,—picked up a little here and yonder. (Same objection by plaintiff. Overruled. Exception.) No, sir, I did not get any information with reference to it while I was with the Celery-Cola Company. (Same objection by plaintiff. Overruled. Exception.) I bought part of the formula from a party. (Same objection by plain-

(Deposition of David Earl Moody.)

tiff. Overruled. Exception.) You ask who I bought it from; well, it's a personal matter, I don't know that it concerns this business. (Same objection by plaintiff. Overruled. Exception.) You say you would like to have me answer the question and Mr. Hirsch advises me that I don't have to answer it if I don't want to, and objects to it on the same ground as the previous objections; it's a personal matter and, unless I am obliged to answer it, I don't care to. I have no reason for declining to answer, only it's my personal affairs and I don't think it concerns anybody else outside of myself. Of course, if the Court requires it I will answer it, but it's a personal matter and I don't care to answer. Nobody was associated with me in my "Queen-Ola" business. No, sir; I am neither a chemist nor a druggist, nor am I acquainted with the handling of drugs or products of that sort. You ask if I said that I thought part of my product and invented the other part; I bought all of it. No, sir, I didn't buy all of my formula,—you asked if I bought any of my product. I bought part of my formula and invented the other part. (Same objection by plaintiff. Overruled. Exception.) I bought all of the ingredients that it is made of. (Same objection by plaintiff. Overruled. Exception.) No, sir; I do not buy my extract already made in extract form. I buy the essential oils and mix it myself. I make my own extracts according to my formula. (Same objection by plaintiff. Overruled. Exception.)

(Deposition of David Earl Moody.)

(Plaintiff here tendered and offered in evidence Plaintiff's Rebuttal Exhibits #61 to #64, inclusive.)

[1402]

Deposition of B. U. Hopper, for Plaintiff (in Rebuttal).

B. U. HOPPER.

Direct Examination by Mr. HIRSCH.

I live at 606 North 24th St., Birmingham, Ala. I am a clerk in the postoffice here in Birmingham and have been such for three years. Yes, sir, I was acquainted with J. C. Mayfield and the business of the Mayfield Manufacturing Company and of the Celery-Cola Co. I knew them somewhere from the early spring of 1904 for a year and a half, or about, two years. I worked for one of these companies a short while; I was, though, in the building with them. I had a bottling works in the building,—rented a part of the building from Mr. Mayfield and ran a bottling works which he had no part in, but I was in the same building with them. The concern I worked for was the J. C. Mayfield Manufacturing Company, for which I worked about three months, I think. I was shipping clerk and had charge of getting up the orders, etc.,—seeing to shipping them out and receiving stuff and checking it off, etc. Yes, sir, I was familiar with the products manufactured by the J. C. Mayfield Manufacturing Co. I don't know just whether I could tell all the soft drinks they manufactured or not; they manufactured a lot of soda-water extracts and syrups that they sold. I can

(Deposition of B. U. Hopper.)

name some of them, though. They had "Celery-Cola" and "Pepsin-Ola" and then a lot of lemon, orange, strawberry, vanilla, and such extracts as that, used at soda-fountains. You ask if I ever heard of the Mayfield Manufacturing Company or the Celery-Cola Company making a drink or syrup called "Koke,"—"K-O-K-E"; not while I was with them, I don't know of any and never heard of any. You ask if I ever saw any bottles, jugs, kegs or barrels shipped out, or any syrups shipped out, or if I ever saw any advertising of any kind or character that had on them "K-O-K-E," shipped out of that place; I don't remember of any at all. I remember several of those who worked there while I was there. There was a Mr. Pogue and a Mr. Moody; then there is others, but I don't know the names,—I know the men when I see them, but I don't know their names. I think there was a young fellow named Trent that worked there for awhile.

Cross-examination by Mr. LITTLETON.

If Mr. Mayfield made any extract or syrup called "Koke" it has been so long ago that I don't remember it. **[1403]** Of course he could have made it and I couldn't say that he didn't make it, but I don't remember him making it. I didn't see any and I don't remember of any. He was making a number of these extracts, but "Celery-Cola" was the thing he was pushing. However, along with that he was making a lot of little extracts and syrups that he was selling in small quantities and there was quite a number of them. I couldn't say that I could name them

(Deposition of B. U. Hopper.)

all, at all. It has been several years ago, and, not knowing that I would ever be asked to even think of these things again, of course, I wouldn't be able to.

Redirect Examination by Mr. HIRSCH.

No, sir, I do not remember having labeled or bottled anything and do not remember seeing anything that was labeled, or that had "K-O-K-E" on it.

Deposition of W. M. Smith, for Plaintiff (in Rebuttal).

W. M. SMITH.

Direct Examination by Mr. HIRSCH.

I am 24 years old and reside at Powderly, a suburb of Birmingham. I am an automobile mechanic. Yes, sir; I worked for the Mayfield Manufacturing Company,—I don't exactly know the exact date,—but it was along about 1902 or 1903, sometime along there, up until about 1906 or 1907. When I first went to work with that concern I commenced washing bottles at first and then they put me to labeling and then after I got on to bottling they put me to bottling and I bottled on up to the time I quit. I also mixed some syrup. I packed the bottles and shipped cases. The Mayfield Manufacturing Company was engaged in Celery-Cola, Pepsin-Ola, Hop-Ale, Cider and Vinegar and stuff like that. They were first located on Powell Avenue and 20th Street and from there they went to 2114–2116 Morris Avenue. They shipped some of the bottles in barrels and then they shipped small shipping cases with four dozen bottles at times and at other times with eight dozen small

(Deposition of W. M. Smith.)

bottles to the case. They also shipped out syrup in five and ten-gallon kegs and in half-gallon and one-gallon and two-gallon jugs. No, sir, while I was working for the Mayfield Manufacturing Company they did not ever manufacture, sell or offer for sale any product, or have any barrels, kegs, bottles, jugs or anything, with a label, or anything, on it, with the name of "Koke,"—"K-O-K-E." No, sir; there was never a product, to my knowledge, made with "K-O-K-E" on it. **[1404]** No, sir, there was never a product around there with "K-O-K-E" on it, nor was there ever any advertising around there with that on it. Yes, sir, on March 4th or 5th of this year, Mr. J. C. Mayfield, Sr., stopped me on 3d Avenue and 20th Street, Birmingham, and asked me to wait a minute. He called me off to one side and said: "We are having court up here at the Tutwiler Hotel. I want you to come up there. Maybe you can do me some good. We are bottling a drink called 'Koke' and I know you have seen the stuff that we bottle. All you have to do is to go up there and tell them we have been bottling that stuff." He handed me a little slip with "Koke" printed on it. After that he asked me what I was doing then, and I told him I was in the automobile business, but was not working just then. "Well," he said, "Maybe after this case is over, perhaps I could give you a job in Louisiana in the bottling plant down there." He took down my address and gave me that little slip.

(Defendants object to the question and answer and move to strike the same because no foundation was

(Deposition of W. M. Smith.)

laid for such rebuttal testimony in the cross-examination of the witness J. C. Mayfield. Overruled. Exception.)

The little slip marked Plaintiff's Rebuttal Exhibit #66 is a slip just like the one that Mr. Mayfield handed me, but I didn't notice about the number of it. (Same objection by defendant. Overruled. Exception.) I told Mr. Mayfield I didn't know whether I could go down there or not, but if I could do him any good I would like to if there was any possible chance; I didn't know whether I could or not. I remember the names of a few of the people who worked for the Mayfield Manufacturing Company while I was there; namely, Mr. Garrett and Homer Brewery, the latter a colored boy who worked in the shop washing bottles at that time, and James Dickson, Howard Trent and John Bevell. No, sir, I have no recollection of anything like Plaintiff's Rebuttal Exhibit #66 having been used at the Mayfield manufacturing Company while I was there. I done most of the labeling.

Cross-examination by Mr. LITTLETON.

Mr. Pogue was with Mr. J. C. Mayfield when he had this conversation with me above referred to. I don't recollect whether Mr. [1405] Steve Mayfield was with him or not, but I don't think he was. You ask if Mr. Norman was with him; I don't know, sir. It has been so long ago I don't remember whether or not any other gentleman was with him besides that. You say I *can't* remember back in 1905 and 1906, but that I can't remember back two months

(Deposition of W. M. Smith.)
ago; well, I expect I could. You ask me to think right hard; well, stopping on the street where there were so many people there might have been somebody there who wasn't with him at all. You ask if it is a fact that this extraordinary proposition he made to give me a job in New Orleans didn't impress me at all, if it was just a casual thing that occurred every day and didn't impress my mind in the least, and you again ask if I hesitate to answer the question; well, I never gave it a thought when he was talking to me, I didn't know whether there was a chance for me to get a job or not. I wasn't particular about going to New Orleans. No, I didn't tell Mr. Hirsch on direct examination that I wanted to go to New Orleans, but I would go there if there was a possible chance of me getting a position. No, sir, I was not dissatisfied with the position I had. I wanted to change and go to New Orleans because I had kin people down there. No, that prospect of getting a job and going down there with my kin people did not impress my mind very much, I don't think. ("XQ. 40.) Now, I will ask you, Mr. Witness, if Mr. Mayfield didn't ask you if you remembered his making "Koke" in Birmingham in 1904, 1905, and 1906, and if you didn't make the statement in the presence of Mr. J. C. Mayfield and W. F. Norman, that you did remember that he made "Koke," and if you didn't go on and describe the label with which the product was labeled?" "(A.) Mr. Mayfield asked me to say that." "(XQ. 41.) On the contrary, didn't he ask you whether or not he had

(Deposition of W. M. Smith.)

made 'Koke'? "(A.) He asked me, yes, sir." "(XQ. 42.) If you remember his making 'Koke.'" "(A.) He asked me did I remember it and I told him yes?" "(XQ. 43.) And you told him yes?" "(A.) Yes." "(XQ. 44.) And I now ask you whether or not you didn't come into this hotel then, the Tutwiler Hotel, in the presence of J. C. Mayfield and W. F. Norman and me, A. B. Littleton, and make the statement to me that you remembered his making 'Koke' and labeling it 'Koke' and that you washed his 'Koke' bottles, and that your recollection on that was clear, and if you didn't describe the 'Koke' label to me?" "(A.) Yes, sir." **[1406]** "(X. 45. That statement you now say is untrue?" "(A.) I didn't say it was untrue, I tell you I did say that." "(XQ. 46.) You told me that was true, that you remembered that at that time?" "(A.) Yes, sir." ("XQ. 47.) Well, was it a fact, did you remember it, or did you not remember it?" "(A.) I did remember it. I don't remember him making 'Koke,' but I remember saying he made 'Koke.' Yes, sir, I deliberately told you a falsehood when you asked me the question, and I confess publicly before the Court that I falsified on that occasion. You ask who first saw me with reference to my testifying in this case on behalf of the Coca-Cola Company; why, a Mr. Harrison left his card for me at the Highland Garage to come to the Florence Hotel, Saturday a week ago. I don't know who he is." "(XQ. 55.) Is he one of these numerous 'Coca-Cola' detectives floating around town?"

Mr. HIRSCH.—"I object to that; there is no evi-

(Deposition of W. M. Smith.)

money I was getting at my trade of automobile mechanic. The job was satisfactory, all except I wasn't getting enough salary. You ask which one of the statements is true, that I wanted to go to New Orleans to be with my kin people or that I wanted to go there on account of getting a better job; I wanted to get a better job. You ask if I repeat the statement I made that I wanted to go to my kin people; I haven't seen them since I was a baby and don't know anything about them. All I know is they are down there and that's all. Yes, sir; I would like to go down there to see these people who are utter strangers to me and whom I have never seen in my life and that's the impelling inducement that made me want to leave a fine city like Birmingham to go down to a place like New Orleans. I am asked by Mr. Hirsch if I claim my attendance fee and am advised **[1408]** that I am allowed $1.50 for attendance; yes, sir; I claim it.

(Plaintiff here tendered and offered in evidence Plaintiff's Rebuttal Exhibit Nos. 66 and 67, the latter being the receipt from the witness for the witness fee of $1.50 paid to him by Counsel for Plaintiff.)

Deposition of J. T. Ensley, for Plaintiff (In Rebuttal).

J. T. ENSLEY.

Direct Examination by Mr. HIRSCH.

I reside at 606 N. 24th St., Birmingham, Ala. I am in the insurance business at 401–3 Woodward

(Deposition of J. T. Ensley.)

Bldg. I am 28 years old. I know Mr. J. C. Mayfield, Sr., and have known him about 16 years, I guess. Yes, sir; I was connected with him in a business way for, I think, about five years. When I first knew him his business was located on Morris Ave. and at 1526 So. 20th St. I don't remember the number on Morris Ave. I worked for the Mayfield Manufacturing Company for quite a while. I am not sure about dates, but I think it was either 1900 or 1901 that I began working for them, and I was connected with them until about 1906, I think. My duties consisted of first one thing and then another. I started out in knee-pants, I believe, washing bottles, and I was on the wagon part of the time. I was not there in any other capacity. They were in the bottling business, syrup business, manufacturing syrups of different kinds. They also sold different kinds of wine and "Hop-Ale." You ask what kind of syrups they sold; well a number of syrups that they put on the market. They put out all the popular flavors, I believe, such as lemon extracts and syrups, vanilla, strawberry and all the soda-water drinks and "Vig-O,"—a specialty drink, —"Pepsin-Ola," "Peppo-Ade," Celery-Cola,"—that's all that I remember of. Part of the time I was in a position whereby I became familiar with the labels they put on barrels, bottles, jugs and kegs, and part of the time I was not. You ask if during the time I can remember I ever knew of them manufacturing any drink down there, or having any labels at their place of business with the word

(Deposition of J. T. Ensley.)

"Koke,"—"KO-K-E" on it; I don't remember it, sir. No, sir; I never did see any stickers or labels or anything with the word "Koke" on it. The first time I ever heard of Mr. Mayfield and his associates manufacturing a drink called "Koke" was sometime the latter part of 1914, I think. I met his son, Mr. Steve Mayfield, one day and he was showing me a letter from his father,—I just **[1409]** noted the letter-head. Yes, sir; I was at one time connected with the Celery-Cola Company, but I never heard of them having any "Koke." The instance I have just related is the first I ever heard of "K-O-K-E." The question as to who else was working with the Celery-Cola Company or J. C. Mayfield at the time I was there will be hard to answer. I believe Mr. Moody, Mr. Pogue,—I don't know whether he was connected with the Company or not; he was around there quite a good deal, and I think he was, but I couldn't say for certain,—Mr. Benjamin I believe, for a while, Professor Ellis,—that's all I recall at the present time.

Cross-examination by Mr. LITTLETON.

No, sir; I didn't say that the first time I ever heard the word "Koke" was in 1914. I have heard that word since I was a kid, people would go up to the counter and call for "Koke" and "make it a dope" and such as that. I have heard the word before. You ask if I have named all the things Mayfield Company was making and selling; I believe that they had some kind of bitters that they put out,—but that wasn't in the soft drink line, but I don't

(Deposition of J. T. Ensley.)

remember the name of it. Besides these soda-water drinks, they were making and selling wines and vinegar. Yes, sir; I was in the shipping department a while labeling the products, and, also, washed bottles at the bottling machine, and was on the wagon, and did various things around the place. Yes, sir; I labeled his vinegar casks. I remember a few of the brands of vinegar he was putting out. "Elko County Vinegar," I believe, was the leader. No, sir; I can't think of any other brands. He had other brands of vinegar, but I don't remember them. They didn't impress my mind. It has been five or six years since then and I haven't thought about it since. Yes, sir; he was also making cider, and I guess I can call over the number of different brands of cider which he was putting out; namely, Grape, Peach, and I believe he put out a Pineapple flavor cider, Cherry, Blackberry, I believe, that's all I remember. I couldn't say whether he put out five or only four flavors; he might have had other flavors, but those are the ones I remember. You say that I have named five and that you want to be certain whether he put out four or five; well, let me go over them again. He put out Grape, Peach, Pineapple, Blackberry and Port Wine. You say that isn't cider and that you are speaking of cider. **[1410]** Well, we called this cider according to where we shipped it,—if it was in Mississippi we called it cider, but if it was in Alabama we called it wine, it all depended upon where we sent it. I don't remember whether there were any other brands

(Deposition of J. T. Ensley.)

besides these. I am sure there were other brands of vinegar than the "Elko County" vinegar. Yes, sir; he was making a number of extracts, and I didn't pretend to remember all the extracts he was making, I couldn't call all the names. If he made any "Koke" syrup, or "Koke" extract, it has now passed out of my memory. It is possible he could have made it without my knowing about it, but I don't now remember. They had their extract business away from here part of the time, and manufactured, I believe, in St. Louis and Nashville, and I wasn't familiar with what they were doing there. They shipped extracts from those cities to Birmingham. They had a branch house in St. Louis, I believe, and probably in Nashville. As a matter of fact, Mr. J. C. Mayfield, Sr., made up his extracts most any place he was at,—get him a paddle and barrel and mixed up his extracts. He would go about the country and wherever he happened to be he would make up a batch of it, and, as I say, in St. Louis, Birmingham and Nashville he made extracts. Sometimes he would be in Birmingham, sometimes in St. Louis, sometimes in Nashville and sometimes somewhere else. When he was in Birmingham he mixed his extracts upstairs. I have called over all I remember being mixed. It has been so long ago that if there were any others they have passed out of my mind, that's as near as I can remember. Mr. Hirsch asks me if I was subpoenaed in this case and if I claim my attendance fee, to both of which questions I

(Deposition of J. T. Ensley.)

answer, yes. (Having claimed his attendance fee, $1.50 was paid the witness, J. T. Ensley, by counsel for the plaintiff.

Deposition of B. M. Allen, for Plaintiff (in Rebuttal).

B. M. ALLEN.

Direct Examination by Mr. HIRSCH.

I am attorney-at-law and live in Birmingham, Ala. I have been a practicing attorney for about thirty years, I guess. Yes, sir; I remember a case in 1907, tried before Judge Bonner,—at that time it was called the Inferior Court,—entitled The State versus Melville Rice. **[1411]** I was attorney for the defendant in that case. It's a long time to remember, but I conducted the cross-examination of the witness who appeared on behalf of the State any my recollection is that I tried the case unassisted by other counsel. I can only give my recollection from the general, probable situation; I couldn't state specifically from actual memory, of course, so far back. My acquaintance with the Mayfields was limited. I knew the elder Mr. Mayfield, I don't know whether his name was J. C. Mayfield or not,—then he had a son, and there was also a lady who had formerly been Mrs. Mayfield, who was interested in the case,—I don't know that I could testify to the names or initials of the parties except in connection with identification that way. I know Mr. Stallings, the Court Stenographer, very well. My recollection is that he took down the testimony in

(Deposition of B. M. Allen.)

that case. I have a transcript of that testimony in my files, I know it is one of our file records. You ask me to look at Plaintiff's Rebuttal Exhibit #6 and see if I recollect that; well now, of course, I couldn't identify this particular paper, but I know that the general conditions are correct; I know the parties are correctly stated, and that I was the attorney for the defendant and I remember generally what was testified to and we had a copy of the testimony. Now, of course, I say I haven't read that particular copy there. I have a copy of the testimony in my office. I haven't it with me. I remember the case quite distinctly. I remember what the man was charged with, I think, and, what the general line of inquiry was,—he was charged with stealing some syrup, I believe, something of that sort, also some supposedly wonderfully valuable formulas,—I know I tried to find out what they were and the Court wouldn't let me.

Deposition of Thomas Dickson, for Plaintiff (in Rebuttal).

THOMAS DICKSON (Col.)

Direct Examination by Mr. HIRSCH.

I live at 2126 Sixth Alley, North Birmingham, Ala. Yes, sir; I worked for the Mayfield Manufacturing Company, but I don't know, Cap, how long it was; I worked for them a long time, about five or six years. I reckon; I just don't know how long, but I worked for them a long time. Yes, sir, I know about when I started to work for them,—well, I

(Deposition of Thomas Dickson.)

know where they were when I started. They were on Powell Avenue and 20th St. It ought to be about the year 1902 or 1903, somewhere about **[1412]** that time. I first started driving a wagon, washing bottles and one thing and another; later on they found out that I was a chemist and they made me do a whole lot of things around there. You ask if I ever mixed any drinks around there; yes, sir; something like the syrups, and one thing and another. They were making "Celery-Cola," and "Pepsin-Ola," and soda water and such things as that. Yes, sir; I mean by that strawberry and lemon and peach. No, sir; they didn't make the cider, but they handled it, and, also, handled "Hop-Ale." You ask if I ever knew of any drink around there that they bought, or made, or sold, or handled, or labeled, or any advertising matter, or anything around there that had the name "Koke," "K-O-K-E," on it; I don't remember that, Cap, I never saw that, I can't remember that.

Cross-examination by Mr. LITTLETON.

Yes, sir; I am a negro. Yes, sir; I can read and write. I went to school at Atlanta University in Atlanta, Ga. In addition to these things I have testified about, they also made some bitters around there,—"Vig-O" was one of the names, Cap. One of the bitters was called "Vig-O." You ask what else; let's see,—well, I disremember the others. That's all I know of. No, sir; I don't remember anything about the cider, they didn't make the cider, you know, Cap. You say what else they were selling

(Deposition of Thomas Dickson.)
besides what I have mentioned; well, there is orange phosphate, something like that, they would make that, that's a cider but they called phosphate,—it isn't a cider, either, because it doesn't make you drunk, either, unless it sours; it's got to stand sometime before it makes you drunk, something like a year before it makes you drunk. Yes, sir, they were selling vinegar, but I couldn't say how many brands they sold. No, sir; I don't remember the names of any of the brands of vinegar, I just know it was vinegar. Yes, sir; I have forgotten the names of the brands of vinegar they were selling. I didn't pay much attention to the vinegar, I just paid attention to my mind on the work. I always keep my mind on my work as best I can, you know. Yes, sir; my work included everything around there, mighty nigh, because I was kind of manager of the colored department,—all the niggers. I was the boss of the negroes and would be after all the negroes who handled the vinegar. **[1413]** I certainly did see that they put the proper labels on it, but I can't remember the name of a single brand of vinegar he put out. I tell you how it was, I have been out of business so long,—I have got a good trade, but I can't get no money for it in this town and I had to make a living and so I got out and went to work to make a living and it has passed out of my kind. You ask if the vinegar was not one of the biggest parts of the business while I was there. Vinegar was selling right on, but I can't remember the vinegar because I never paid much attention to the vine-

(Deposition of Thomas Dickson.)

gar, but I knew the names, the different names of the vinegar, all right. I can't remember the names of the ciders they were selling,—nothing but the phosphate, something like that. No, sir; prosphate is not a cider, it's phosphate. As I have before told you, it isn't a cider at all until it stands something like twelve months. You say that I don't seem to be able to remember the names of the different brands of vinegar and you ask me how many different brands of vinegar he sold; no, sir, I don't,—cherry and blackberry,—just any kind of names people wanted. No, sir; I don't remember any pineapple cider either, I don't remember making that. Sure, lots of things were made there that I don't know about and don't remember about; I will tell you, Cap, I can't remember all that, I have been doing other kind of work. After I couldn't get paid for my kind of work I just naturally gave it up. You ask if my memory now isn't very hazy indeed as to the different brands of drinks that were put out; well, I just naturally have done forgotten about it,—just trying to make a living, that's all. You ask if this "Koke" which he was making there has passed out of my mind, too, like the cider and the vinegar which I handled; well, I don't remember that at all. You ask if I remember the barrels that he put that extract in when he shipped it out; I don't remember the "Koke," Cap, I am going to tell you the truth, I don't remember the "Koke." No, sir, I don't remember the brands of the vinegar, or the cider, either, I sure don't. I just know we shipped

(Deposition of Thomas Dickson.)

vinegar. There was white-wine vinegar, and apple vinegar and all like that, and cider vinegar, these are the three I know of; but whether we shipped them all I don't know, I disremember. Yes, sir; I remember what "Celery-Cola" was; it was what you might call the extract, you know,—that was the fountain syrup. [1414] You ask if it was a syrup or an extract; well, it goes out in syrup, you know, extract in the house. Whenever it went out they sold it in syrup, you know. Yes, sir; they were doing some bottling when I was there, but I don't know the number of different brands of Cola drinks Mr. Mayfield was making and selling at the time. I can't remember whether he was selling two or three brands or not because there were different soda-waters, you know. However, he did sell two or three of these Cola drinks, "Pepsin-Ola" and "Celery-Cola." No, sir; "Pepsin-Ola" was not a Cola extract, that was "Pepsin-Ola." You ask whereabouts in the building I worked; I worked upstairs on Powell Avenue and 20th Street and also at 2114 Morris Avenue. You ask if any business was going on over there, too; not more than a place where they had to do the mixing, you know,—above where anybody had any business, you know. I was all over the building because I was negro boss, to see that the rest of the negroes worked, and I worked myself, Cap. I did the mixing part of the time upstairs on Morris Ave. The cider was already mixed when it came there, but I made the phosphate myself. I couldn't say exactly what year it was that I

(Deposition of Thomas Dickson.)

went to work for them, but I started on Powell Avenue and 20th Street. No, sir; I did not first go to work on Powell Avenue for Ensley and Hopper. I went to work for Mr. Mayfield. I never has worked for Ensley and Hopper. Of course, they owned the bottling department at that time.

"Q. (By Mr. HIRSCH.) You claim your attendance fee of $1.50?"

"A. Yes, sir."

(The witness, Thomas Dickson, having claimed his attendance fee, $1.50, was paid him by counsel for the plaintiff.)

Deposition of Homer Brewer, for Plaintiff (In Rebuttal).

HOMER BREWER (Col.)

Direct Examination by Mr. HIRSCH.

I live at 1631 Avenue K., Birmingham, Ala. I will be 30 years old the 10th day of September. At the present time I am employed by the Coca-Cola Bottling Company of Birmingham. Yes, sir; about June, 1906, I was employed by the Celery-Cola Company here in Birmingham. I stayed with them six or seven months. No, sir; I never heard, during that six or seven months while I was over there, of any product by the name of "Koke." No, sir; as far as I know they were not making any product by the name of "K-O-K-E." [1415] No, sir; I did not see any labels or advertising matter with the name "K-O-K-E" on it while I was over there.

(Deposition of Homer Brewer.)

Cross-examination by Mr. LITTLETON.

I have been employed by the Coca-Cola Company since June, 1909. I haven't been talking to anybody about my testimony in this case. No, sir; I never breathed it to a living soul before I entered this room just now. Nobody on earth knew what I was going to testify to until I came into this room and took that chair. No, sir; Mr. Bodeker over there never did see me about it, nor did Mr. Pierce. Nobody at the Coca-Cola Bottling plant ever talked to me about my testimony. Yes, sir; I was in the other room just now. You ask if Mr. Pierce was in there, too; I don't know Mr. Pierce. No, sir; I was not talking about my testimony in this case in the other room. I don't know, sir, how they knew what I knew about it. You ask if they just dreamed it; I don't know, sir, how they knew it. You ask if I suppose that the attorneys for the Coca-Cola Company would bring me in here and put me on the stand without knowing what I was going to testify to; he knew I worked for the Celery-Cola Company. You ask how he knew that if I didn't tell it to anybody; well, Mr. Gresham asked had I ever worked for the Celery-Cola Company and I told him then that I had worked for the Celery-Cola Company, that's all he asked me. Mr. Gresham is with the Birmingham Coca-Cola Company. He asked me that about five months ago. I washed bottles when I was at the Celery-Cola Company. You ask how many bottle washers they had there, saying that you had five or six here to-day; they didn't have but one

(Deposition of Homer Brewer.)

at the time I was there. Yes, sir, Jim Dickson was there when I was there. No, sir; he was not washing bottles then. Yes, sir; Mr. Will Smith was there when I was there and he was washing bottles part of the time. We all done different work, you know, all of us. I worked downstairs. The place of business was on Morris Avenue. That's all I did around there, just washed bottles, and I don't know anything else that was going on there at all except the bottles I would wash. Yes, sir; I can read and write; yes, sir; I am a negro.

Deposition of Tom Anderson, for Plaintiff (In Rebuttal).

TOM ANDERSON (Col.) [1416]

Direct Examination by Mr. HIRSCH.

I am 54 years old and live at Rosedale, a suburb of Birmingham. I am working for the Southern Railroad Company, delivering freight. Yes, sir; I knew Mr. J. C. Mayfield and I once worked for the Schooler Vinegar and Cider Company. I was there when Mr. Mayfield bought them out. I worked for Mr. Mayfield something like three or four weeks after that. Yes, sir; I also worked for the Celery-Cola Bottling Company. They bottled "Celery-Cola,," Ginger Ale, Cream Soda Waters, Lemon Soda Waters, and Orange Soda Waters, and Strawberry,—such as that. I worked for the Celery-Cola Bottling Company something like three years. No, sir, I never heard, during the time I was working there, of any product manufactured, made or sold by

(Deposition of Tom Anderson.)

the name of "Koke," nor did I ever see any labels or anything with "K-O-K-E" on it. I didn't see none, either, while I was with Mr. J. C. Mayfield and while I was with the Celery-Cola Bottling Co. If it was there I didn't see it, they kept it away from me.

Cross-examination by Mr. LITTLETON.

I first worked with the Schooler Vinegar Company and then with the Celery-Cola Bottling Company. I never did work for the Celery-Cola Company. You ask if those are the only two concerns I worked for; I worked for Mr. Mayfield something like three or four weeks before I worked for the Celery-Cola Bottling Company. After he got in possession of the Schooler Vinegar Company, I worked for him until he went and cut my wages and I couldn't stand for that so I went right downstairs and went to work for the Celery-Cola Bottling Company. You ask if I felt that he didn't treat me right at that time; I know it wasn't right. No, sir; I never held it against him ever since. He could pay me what he pleased and I wasn't obliged to work for him, was the way I looked at it. I said I worked for Mr. Mayfield individually something like three or four weeks and then I worked for the Celery-Cola Bottling Company between two and three years. For the last-named concern I mixed their drinks and bottled them, both. They had only one person there doing the mixing which was me. I don't remember the year in which I was doing the mixing, I am afraid to say, I might be wrong. I never kept no tab of it because I thought the thing [1417] was

(Deposition of Tom Anderson.)

over and past, and I never paid no attention to it. The concern for which I mixed drinks was the Celery-Cola Bottling Co. I made the syrup myself that was used by the Celery-Cola Bottling Company. The extracts were made by someone else and I had to mix the extracts with the syrups to make up the drinks they wanted. I did the mixing for two or three years, something like that. The place where I mixed these drinks was 1520 South 20th St. and Powell Ave. I mixed it in the rear end of the building on the ground floor,—they were once on the second floor and they moved to the ground floor and there is where I last bottled it on the ground floor. You ask if I remember distinctly the products which the Schooler Vinegar Company, J. C. Mayfield and the Celery-Cola Bottling Company were handling and selling; the Schooler Vinegar people didn't do anything but handle vinegars and ciders and Mr. J. C. Mayfield came into possession of that, and I don't know what he handled after I quit him. I couldn't say what he handled because I wasn't on his floor at work. Where I worked was where I done the other work and I stayed there until my quitting time and then I went home. I knows part of the products that were made by these concerns I worked for. As I have just told you of the Celery-Cola people I know what they sold and I did know of J. C. Mayfield at one time selling "Hop-Ale," something of that kind; that's all I know about his sales. No, sir; I don't know how many brands of vinegar J. C. Mayfield sold, but I know how many the Schooler Vine-

(Deposition of Tom Anderson.)

gar Company sold when I worked for them. They only sold two brands. "Elko" was the clear vinegar and the other was called "White-Wine Vinegar." The Celery-Cola Bottling Company did not handle any vinegar, nor did they handle any "Hop-Ale" while I worked for them, nor any cider. Yes, sir; James W. Dickson was working there when I was working there; he was drayman there at that time. I couldn't say whether that was all he did or not because his work was on the upper floor above me, and my work was before me, and I stayed up there on my work and didn't know what anybody else did. No, sir; he was not driving wagons on the top floor, he couldn't drive it up there, you know. I did say he was drayman, but he didn't drive on the top floor. I understand a drayman is a man that receives and delivers any parcels or packages to and from others in any part of the city and the town, a man that drives a wagon. [1418] You ask how long he drove a wagon on the top floor; I didn't say he drove a wagon, I said he drove a dray,—I told you I didn't know what other work he did do. When I was there his principal work around there was driving a dray. You ask if he was just driving a public dray or if he was employed regularly by the company; well, he was employed by the company while I was there, by some one in the house. I know he didn't own the team, because the company owned it. Well, no, sir; I didn't wash bottles around there. Washing bottles was out of my line. I bottled and mixed the drinks,—I had men to wash the bottles,—

(Deposition of Tom Anderson.)

or boys, rather. I believe Mr. Moody owned the Celery-Cola Bottling Company when I was there,—John Ensley and Mr. Moody, as far as I know.

"Q. (By Mr. HIRSCH.) You want your $1.50 fee for attending here, do you Tom?"

"A. Yes, sir."

The witness, Tom Anderson, having claimed his witness fee for attendance, $1.50 was paid him by counsel for plaintiff.

Deposition of George E. Anderson, for Plaintiff (In Rebuttal).

GEORGE E. ANDERSON (Col.)

Direct Examination by Mr. HIRSCH.

I live at 309 S. 15th St., Birmingham, Ala. I work at 9½ North 20th St., hat cleaning and blocking. I came to Birmingham about 1902. Yes, sir; I know Mr. J. C. Mayfield, Mr. Will Mayfield, and Mr. Steve Mayfield, and I worked at one time for the Mayfield Manufacturing Company for about three years, I reckon. I don't exactly know what years they were. When I first went to work for them the Mayfield Manufacturing Company was on Powell Avenue and 20th St. I worked with extracts and vinegar, as helper. When I first went there I was helper, and then, later, I worked in the extract part, syrups and extracts. We made vanilla, and raspberry, "Pepsin-Ola," and extracts,—Cassia, Ginger-Ale,—I believe that's all. Yes, sir; we made "Celery-Cola." No, sir; while I was working there I never heard of them making or selling or handling

(Deposition of George E. Anderson.)

any product by the name of "K-O-K-E," nor did I ever see any barrels or labels or anything else with "K-O-K-E" on it. You ask who else was working there; there was a colored fellow named J. W. Dickson, who was drayman, and Miss Alice Wheeler, who was the stenographer, and Mr. Garrett, who was bookkeeper, and Mr. Pogue and Mr. Barclift, who were salesmen. That's all I remember right now.

[1419]

Cross-examination by Mr. LITTLETON.

I said the concern I was working for was the J. C. Mayfield Manufacturing Company. You say that I forgot to mention my father and you ask if he was not working there too; he was working in the bottling department bottling soda-water. You ask if he was not working for the J. C. Mayfield Manufacturing Company; I don't think right at that time that he was working for the people what had the soda-water department, Mr. Ensley and them. I said I worked in the extract department; I mixed the syrup,—they had vanilla and lemon,—different kinds of syrup. There wasn't but just one person mixing syrup at that time and that was me. After I left, James W. Dickson came in my place. I was there in 1902, I reckon. I don't remember exactly what year I was there, but I worked there about three years. About three years from 1902 would take me up to about 1905 and during all that time James W. Dixon was the drayman. No, sir; he was not a superintendent of the colored people there at all. I am 24 years old. You ask if I was about

(Deposition of George E. Anderson.)

eleven years old at that time; I don't know exactly, I never did know my exact age. We got it misplaced,—we had it in the Bible,—that's the way I count. I don't know exactly how old I am. Yes, sir; I was just a boy at the time I was working there; I was just leaving school. I was working up on the second floor of that establishment. You ask how many people were working up there on the second floor; there wasn't but me, one, up there. What I did up there was to mix syrups,—they have different syrups what I mixed, and jugs to send to different places. Mr. Will Mayfield was my boss up there. I did just what I was told to do. Yes, sir; I know what I was mixing up,—like these extracts. No, sir; there wasn't any "Dope" there at all. I never seen anything like that. It wasn't until here of late that I seen the word "Koke." I never knowed nothing about it at that time. We mixed the syrup in a barrel with a paddle. To make the vanilla syrup we would take the simple syrup,—granulated sugar,—and put the extract in it. "Celery-Cola" syrup is made the same way, because it is just stirred up that same way. Simple syrup is just sugar dissolved with water. I did the dissolving. I quit this plant because my father was mean to me and I ran away from home. Tom Anderson, who was just on the stand is my father. [1420] No, sir; he and I have not talked this matter over. Nobody saw me at all about my testimony but Mr. Bodeker. He saw me sometime in April, I think. I told him about the same thing I told you. He didn't tell me any-

(Deposition of George E. Anderson.)

thing about it. He just said you all was coming and I have to come before you all, that's all. Down at the Mayfield Manufacturing Company I earned $6.00 a week. I was just a laborer there to do the actual work of stirring the paddle and mixing the syrup. No, sir; nobody stood there to direct me how to do it. They knowed I knew how after working with Mr. Will Mayfield. They just gave me orders and told me to fill it, write the order out and the card if it is to be shipped. No, sir; I was not in the labeling department. You ask if I knew what label they put on the stuff when it went out; they didn't have no label as I know of, only them stencils they put on barrels. I didn't see any labels at all. No, sir, I didn't see any "Celery-Cola" labels, they have "Celery Cola" labels down in the bottling part, where Mr. Ensley has the bottling syrups, like they used to put on "Coca-Cola." I never did see any "Celery-Cola" labels go on the barrels. They didn't have any barrel labels while I was there except the stencil they had—stenciled on vinegar and the different things they had. You ask if I saw the labels on the different brands of vinegar they sent out; they didn't have no label, they had a stencil to put on the barrels with lamp-black and put on the wood. It wasn't no label but just that stencil. I am sure they didn't put any labels on the "Celery-Cola" barrels, because they didn't have none.

Redirect Examination by Mr. HIRSCH.

"RDQ. 85. Do you claim your $1.50 for attendance?"

(Deposition of George E. Anderson.)

"A. Yes, sir."

(The witness, George E. Anderson, having claimed his attendance fee, $1.50 was paid him by Counsel for Plaintiff.)

Deposition of Mack Crawford, for Plaintiff (In Rebuttal).

MACK CRAWFORD (Col.).

Direct Examination by Mr. HIRSCH.

I live at 213 N. 15th St., Birmingham. I have been living here in Birmingham about twenty years. I am going on 63 years old. Yes, sir, I have known Mr. J. C. Mayfield and I done hauling for the Celery Cola Company. Their place of business at that time was over on Morris Avenue. That was 1906. I don't know what the stuff was I hauled for the Celery-Cola Company more than just barrels and boxes. **[1421]** No, sir, I never did see any barrels or boxes or anything with the name "K–O–K–E" on it; the only thing was "Celery-Cola," I don't know anything else but that.

Cross-examination by Mr. DART.

I didn't haul anything but "Celery-Cola" as I know of. I didn't know no other name but "Celery-Cola," that's the only name I know of.

"Q. (By Mr. HIRSCH.) Mack, do you claim your attendance fee, $1.50?"

"A. Yes, sir."

(The witness, Mack Crawford, having claimed his attendance fee, $1.50 was paid him by counsel for plaintiff.

Deposition of Walter Thomas, for Plaintiff (In Rebuttal).

WALTER THOMAS (Col.).

Direct Examination by Mr. HIRSCH.

I live at 5008 Avenue K. Birmingham, Ala. I have been here continuously nearly 25 years. Yes, sir, I knew of the J. C. Mayfield Manufacturing Company and of the Celery Cola Co. Mr. Mayfield was the manager of these concerns. The connection I had with them was that I used to be drayman—hauled out goods. When I did the hauling they were at 2116 Morris Avenue, that was between 1906 to 1908. I hauled "Celery-Cola" and "Pepsin-Cola" for them. No, sir, I never did haul any product, nor did I see any product of theirs, by the name of "K–O–K–E." I never saw any labels or anything with "K–O–K–E" on it in there nor any barrels or stencils or anything with "K–O–K–E" on it.

Cross-examination by Mr. LITTLETON.

That's all I ever hauled, "Pepsin-Ola" and "Celery-Cola." I never hauled any of the other products that they made, that's all I know of.

Deposition of M. D. Ziegler, for Plaintiff (In Rebuttal).

M. D. ZIEGLER.

Direct Examination by Mr. HIRSCH.

I am 27 years old and reside in Birmingham, Ala. I was employed recently by the Coca-Cola Company to make an investigation here in Birmingham, with

(Deposition of M. D. Ziegler.)

Mr. Frank Platt, who is the one who employed me. Plaintiff's Rebuttal Exhibits Nos. 68, 70, 73, 74, 76, were purchased on March 15, 1915 at the Florence Bar, the Bradley & Carr bar on 18th Street, the Higgins Bar, the Woodward Bar and Morris Hotel Bar, respectively. [**1422**] Plaintiff's Rebuttal Exhibits Nos. 69, 71, 72, 75, and 77 were purchased respectively at the respective bars above mentioned on March 26, 1915. Each of these bottles was purchased by Frank Platt in my presence. In each instance he called for "Coca-Cola" and in each instance I saw one of these bottles handed to Mr. Platt in response to his order for "Coca-Cola." Nothing was said on any of these occasions to explain that it was not "Coca-Cola" that was in these bottles. I signed the labels pasted on each of these bottles. (Plaintiff here tendered and offered in evidence Plaintiff's Rebuttal Exhibits #68 to #77, inclusive.)

Cross-examination by Mr. LITTLETON.

I think Mr. Platt is an investigator. I don't know whether he is a detective or not. I think he is one of these fellows that goes around and investigates facts. Yes, sir, I was paid $1.50 a day for my work in going around witnessing these purchases. I was hired to act as a witness by Mr. Platt,—to act as a witness for these purchases. I am an automobile mechanic and have a job now. I did not have that job at the time I made these investigations. At that time I was working in an automobile job. Mr. Platt told me he wanted me to witness these

(Deposition of M. D. Ziegler.)

purchases to see if he got "Coca-Cola" when he called for it, I guess, and he told me he wanted me to be a witness, so that I could testify in this case and I accepted that employment in order to qualify myself to be a witness in this case. Yes, sir, I could read. Yes, sir, I saw these bottles when they were put out on the counter. I saw the labels very plainly and I don't think anybody could ever seduce me or deceive me by giving me that for "Coca-Cola."

Redirect Examination by Mr. HIRSCH.

No, I am not employed by the Coca-Cola Company and I have not and never have had any connection with it other than as stated above.

Deposition of Miss N. L. Bonham, for Plaintiff (in Rebuttal).

MISS N. L. BONHAM.

Direct Examination by Mr. HIRSCH.

I live in Central Park, Birmingham, Ala. I have lived in Birmingham about fifteen years continuously. I work now for the McKinley, Anglin & White. Yes, sir; I know the Mayfield Manufacturing [1423] Company and I worked for them at one time. I don't know exactly when it was but it must have been between eight and nine years ago. I was stenographer. Yes, sir; I made out bills. Of course, I knew in a general way the business they were carrying on, but I didn't have anything to do with anything except writing the letters and making the bills. However, I saw things that were going on. No, sir, I never did see any product down

(Deposition of Miss N. L. Bonham.)

there or anything down there with "K-O-K-E" on it, nor did I make out any bills or write any letters with "K-O-K-E" on it, and I never saw any advertising of "Koke" or any letters with "Koke" on them that I remember at all. I might have seen it, but I don't recall it,—I don't recall seeing anything with that name on it at all.

Cross-Examination by Mr. LITTLETON.

That's been a good while ago, about eight or nine years ago and if there had been anything of that kind down there it has passed out of my mind.

Deposition of Will Barrow, for Plaintiff (in Rebuttal).

WILL BARROW (Col.)

Direct Examination by Mr. HIRSCH.

I live at 1422 Fourth Avenue, Birmingham. I have lived here for the past 11 or 12 years and am now employed at the Frisco Round House. I am 24 years old. I started work for the Mayfield Manufacturing Company in 1906 or 1907 and worked there about a year and a half or two years, I believe. Their place was located at 2116 Morris Avenue. I commenced as a bottle washer and ended as a bottler. The drinks I saw around there, or bottled during the time I was there, was "Celery-Cola," "Pepsin-Ola," soda-waters and "Hop-Ale." No, sir, I never did bottle or see any drink around there known as "K-O-K-E," nor did I ever see any labels or anything around there with "K-O-K-E" on it. I don't know all of those who were working there when I was

there, but Dickson is one I know and Mr. Will Smith, a white gentleman, was working there at the time; I don't know all of them.

Cross-examination by Mr. LITTLETON.

Yes, sir; I was working for the Celery-Cola Bottling Company. You say you thought I told Mr. Hirsch, a moment ago, that I was working for the J. C. Mayfield Manufacturing Company; he was running the [1424] Celery-Cola Company on Morris Avenue, so they said. I was working on Morris Avenue for the Celery-Cola Company. Yes, sir; I now say that I was working for the Celery-Cola Company at 2116 Morris Avenue and not for J. C. Mayfield. You ask if I mean to say I don't know the name of the Company I was working for; yes, sir, I know it. You ask which one it was I was working for; I was working for the J. C. Mayfield Manufacturing Company. You say, then, that I was not working for the Celery-Cola Company; he was bottling it at the time I worked for him. You again ask which one of these companies I was with; I worked for the J. C. Mayfield Manufacturing Company on Morris Avenue and he was bottling "Celery-Cola" at the time I was working for him. You again ask which company I was working for; I was working for the Celery-Cola Company, I suppose. You say that just a minute ago I said I was working for the J. C. Mayfield Manufacturing Company; that's where I was working at. I was working down stairs. I started there as a bottle washer and Sam Henderson, the shipping clerk, got Mr. Mayfield to give me a job bottling. I

(Deposition of Will Barrow.)

bottled "Celery-Cola," soda-water, "Pepsin-Ola" and other soft drinks. He was making a lot of drinks there. I can recollect the drinks that I bottled. I put plain undecorated crowns on those bottles and also on the "Celery-Cola" bottles as late as 1907. There was some little dark bottles,—some seven-ounce bottles of each kind. The word "Celery-Cola" was not on the crowns. I worked there about a year and a half or two years and quit because I got hurt. A bottle burst on me and cut my leader in two. I went to school a short while at Roanoke, Alabama,—I haven't got any education at all hardly. No, sir, I can't read and write, not much, just a little bit. Yes, sir, I am sure about that. You ask me to read the top word on a sheet of paper you hand me; "S-c-h-e-d-u-l-e N-o 1." You now ask me to read the third word, on schedule 16 on the Notice to Take Depositions; that's "Root Ford" (Rutherford.) You ask me what is the other word; "it is "C-a-r-l-i-s-l-e"; you ask what that spells; I can't pronounce it. You ask what other products they were handling there at this place besides these soda-waters I was talking about; well, they handled some "Hop-Ale" and stuff called bitters, that's all I can remember besides soda-water, "Hop-Ale" and bitters. They were not handling anything else that I know of. Oh, they handled cider and vinegar. [1425] No, sir, I don't know the brands they put on the cider or what was on the labels. I can't remember about them at all. You ask if I can remember the different brands labeled on the vinegar; well,

(Deposition of Will Barrow.)

O. L. Gregory Vinegar Co. I wasn't with that company at that time, I was working with Mr. Mayfield, —he got the vinegar from that place. I don't remember what brands he put on the vinegar. You say that the substance of it all is that he was making a number of different kinds of soda-water down there and some Cola drinks and some extracts and that I remember some and some I don't remember, and you ask if that isn't the substance of my testimony; well, I remember what I saw, I know what I saw go out there. No, I don't know the names of the cider or of the vinegar, but I do know the names of all the soda-waters he handled down there. He handled strawberry, lemon, orange phosphate, "Celery-Cola," "Pepsin-Ola,"—I think that's all I can remember. I won't say but there was others, but these is what I can remember. There may have been others. That's been a long time ago and there may have been others that I can't now remember the names of,—yes, sir, that's right, there may have been others. Yes, sir, this fellow Dickson was mixing syrup when I was there and I was botling the syrup after he mixed it for me. Yes, sir, I put labels on those bottles. They were little labels shaped like that (indicating) just the same shape of the 5-A label they use down here now. It's an oblong label. The word Celery-Cola was written on it, "C-E-L-E-R-Y C-O-L-A." It was printed on there in writing and in red, I believe. The label was blue but the writing was red. You ask if, as a matter of fact, it was not all blue with the writing a darker

(Deposition of Will Barrow.)

shade of blue and the label a lighter shade of blue; well, it's been so long ago,—yes, sir, I know a good deal about the labels. James Dickson first saw me about testifying as a witness on behalf of the Coca-Cola Company on March 15th. He came and talked to me about this thing and Mr. Bodeker came next. Dickson told me he wanted me for a witness. He didn't tell me to say nothing. They just told me they wanted me to tell what I know of it. You ask what Will Smith was doing at the plant at the time; he bottled, too, and labeled. **[1426]** He, a white boy, and I, a nigger, worked side by side. Yes, sir; I am a negro. Then they had a young white boy there who was bottling, too, named Howard Trent. He wasn't a regular bottler, but he did other kind of work, and bottled, too. After I left I don't know what happened down there. Howard Trent assisted the shipping clerk, I think, the only time I seen him there. It was only at times that he used to bottle. That's all I can remember of the people down there. No, sir. I don't know Homer Brewery, nor George Anderson, nor do I know who the stenographers were down there at that time. I said I worked down stairs in the back. I didn't work in the front of the place at all, nor did I work upstairs. I don't know what they were making up stairs.

Redirect Examination by Mr. HIRSCH.

No, sir; I didn't bottle either the cider or the vinegar.

Recross-examination by Mr. LITTLETON.

I said I did the bottling,—that I was first a bottle

(Deposition of Will Barrow.)

washer and afterwards did the bottling. No, sir, I didn't handle any of the barrel stuff that went out at all, and of course, I don't know what labels were put on barrels that went out. "Q. (By Mr. HIRSCH.) Well, do you claim your witness fee for attendance?" "A. Yes, sir."

(The witness, Will Barrow, having claimed his witness fee for attendance, $1.50 was paid him by counsel for plaintiff.)

Deposition of John L. Bevell, for Plaintiff (In Rebuttal).

JOHN L. BEVELL.

Direct Examination by Mr. HIRSCH.

I reside at 748 First Avenue, East Lake, a suburb of Birmingham. I have lived here in Birmingham continuously since the latter part of 1899. I worked for the J. C. Mayfield Manufacturing Company at one time, but I was small at the time and don't know exactly how long ago it was. When I first went to work for them their place was located on 20th St. and Powell Avenue, but afterwards they moved from there to Morris Avenue. I started work for them doing everything in general, — washing bottles. Later on I learned bottling and then I did the bottling. Yes, sir, I put labels on bottles, jugs, kegs and barrels. Yes, sir, I was familiar with the stencil used by the J. C. Mayfield Manufacturing Company. The drinks they were putting out were soda-water, "Celery-Cola" and "Pepsin-Ola,"—I believe that was [1427] the name of it,—and that's all

(Deposition of John L. Bevell.)

that I can remember that we were putting up. You ask who was working there at the time I was there; Will Smith and Howard Trent were bottling at the time and there was a negro working there by the name of Dick,—I forget his last name. The last time I was there I did the labeling. No, sir, I never did label any barrels, boxes, jugs, kegs or containers of any kind with the name "Koke," nor did I ever see or hear the name "Koke" around there in any shape or form so far as I remember. They were not manufacturing anything by the name of "K-O-K-E" so far is I rememebr. Myself and others handled the stencils and labels. I seen Mr. J. C. Mayfield and Mr. Will Mayfield down at the Hillman Hotel a few months ago when I was driving a taxicab. Mr. Mayfield showed me a card with the word "Koke" on it and asked me did I remember anything about them bottling it when I worked for them and I told him I didn't. He said the Coca-Cola Company were suing him, or something to that order, and that he might want me as a witness to go to New Orleans when it came up and that he would let me know further. Plaintiff's Rebuttal Exhibit #78 is the book which I had when I was working for the Mayfield Manufacturing Co. Yes, sir, I wrote these down in that book myself, I copied them from the man what was mixing syrup at the time,—his name was Herbert Childerson.

Cross-examination by Mr. LITTLETON.

Since 1899, I have been driving an automobile and working in an automobile shop and I worked at one

(Deposition of John L. Bevell.)

time for the Hyland Bakery. At present I am bottling for the Chero-Cola Bottling Company, where I have been employed for about three weeks. At the Hyland Bakery I made bread and pies,—I worked on the bread crew. The Hyland Bakery made bread, pies, cakes, rolls, biscuits, doughnuts. Yes, sir, the Chero-Cola Bottling Company bottles Chero-Cola and a number of different flavors of soda water. No, sir; I didn't just bottle at the J. C. Mayfield Manufacturing Company; when I first went to work there I went to washing bottles. It's been so long ago that I don't remember but I think Howard Trent was working there before I went to work there and I think he was washing bottles along with me and that he bottled at the time. I don't know how long I worked there, I couldn't tell you. **[1428]** I think I went to work there about the latter part of 1903 or 1904, on 20th St. I expect I was there a couple of years,—I know it was over a year. All the time I was working for them I worked for the J. C. Mayfield Manufacturing Company. You ask if I ever worked for the Celery-Cola Company; well, that's the same Company. You ask if I ever worked for the Celery-Cola Bottling Company; I don't know, sir, how they run all them. I know I was working for Mr. Mayfield and he was paying me,—I don't know what name the Company went by. No, sir, I don't know anything about his vinegar Company. I will be 25 years of age my next birthday. Yes, sir, I was about 14 or 15 years old when I was down there. Yes, sir, I was wearing short pants. No, this fellow,

(Deposition of John L. Bevell.)

Herbert Childerson, didn't mix the syrup on 20th Street, he mixed that on Morris Avenue; "Pete" Mayfield done most of the mixing on 20th Street,—that was the young Mayfield boy. "Pete" is just a nickname we call him by. I don't remember what his right name is. I think after they moved over to Morris Ave., that after that the negro Dick mixed the syrups a while. If I remember right, those three are the only ones that ever mixed syrups while I was connected with the Company. Yes, sir, I did the bottling for a while when they were on Morris Avenue,—I didn't bottle on 20th Street to amount to anything. The machine we were using at both places was a Crown machine, and we put decorated crowns on the bottles. The "Celery-Cola" had a decorated crown on it at both places from 1903 up to the time I quit there. I think, though, there was one kind of soda-water that they bottled with a plain crown, but I don't remember what that was. They were making a number of soda-waters. All that has been a long time ago and I was a small boy at that time. I couldn't remember what all they were making. Of course, there was a lot of stuff that I didn't see and didn't know nothing about. I couldn't remember none of the labels that they had,—that is, a description of them,—because they kept most of the labels on the second floor at the 20th street plant. I was washing bottles and labeling the drinks that they put up. I don't think they labeled the soda-water when they were on 20th St. Of course, I was not in the advertising department at all, and don't know

(Deposition of John L. Bevell.)

anything about the advertising; I was back in the bottling department. What went on in the front of [1429] the building, up around the office, why I didn't know nothing about at all. The particular brands which I mentioned in my direct examination are all that I can remember now.

"Q. (By Mr. HIRSCH.) Do you claim your attendance fee?

"A. Yes, sir.

(The witness, John L. Bevell, having claimed his witness fee for attendance, $1.50 was paid him by counsel for plaintiff.)

(The following rebuttal depositions were taken by plaintiff as rebuttal testimony at New Orleans, La., on June 3, 1915:)

Deposition of A. B. Freeman, for Plaintiff (In Rebuttal).

A. B. FREEMAN.

Direct Examination by Mr. HIRSCH.

I have heretofore testified on behalf of the Plaintiff in this case. Yes, sir; I, together with H. B. Pierce, of Atlanta, Ga., had a conversation during July, 1914, in the City of New Orleans, with Mr. William Dalton, of New Orleans. Mr. Pierce was present when I had that conversation. It occurred in Mr. Dalton's office in the Hennen Building. We called on Mr. Dalton and he told us he didn't care to make a statement that would be used, for the reason that he had entirely severed his connection with the Koke Company and was engaged in another line of

(Deposition of A. B. Freeman.)

business, and that he didn't believe he could gain any friends by making a statement or being a witness and that he stood a chance to lose some; but we discussed the case with him. He told us that he had first become connected with the Southern Koke Company, Limited, as a stock broker, or as selling their stock; that he succeeded in selling some of their stock to some of his friends,—I don't think he mentioned the amount,—and that on the death of Mr. Scott, who was killed by a street-car,—he was made general manager. My recollection is he told me that he didn't know anything about the running of that particular business, but that he took it in order to protect himself and his friends in their stock holdings. Then we talked about the manufacture of the syrup and he told us that they manufactured it here in New Orleans from the extract that they got from Van Dusen of St. Louis. **[1430]** He said he understood it was manufactured on the "Coca-Cola" formula,—he had been told that by Mayfield who claimed to have owned an interest in the "Coca-Cola" formula and to have had the original "Coca-Cola" formula. They got the extract from Van Dusen and mixed it with sugar and water and coloring matter, I believe, here and put it in barrels and supplied the territory in and around New Orleans with syrup and made bottling extracts, etc. He told me that he was only connected with them as general manager for a comparatively short period,—probably one or two months—and that he severed his connection during August, probably, at which time, as he expressed it,

(Deposition of A. B. Freeman.)

he forced Mr. Mayfield to buy him out,—not only his interest, but his friends' interest, and he also stated that was what he set in to accomplish, he wanted to protect the people that he had asked to buy stock in the company. We asked him about the marketing methods of the company while he was general manager and he said the conversations that he had with his salesmen, as they would come in to report, were something like this: They would go around to a dealer who was handling "Coca-Cola," introduce himself, of course, as salesman for the Koke Company, and ask them about their sales of "Coca-Cola," —"Do you sell much 'Coca-Cola?'" The dealer would usually say, "yes, we sell so much"—meaning the number of gallons that they would probably consume during the year; and their salesmen would point out to them that they were manufacturing a product that was identical with "Coca-Cola," manufactured on the old, original "Coca-Cola" formula, and were marketing it under the name of "Koke,"—I don't recollect that he used the word "Dope" or that it was mentioned during our interview; I am pretty sure it was not, but the word "Koke" was used. The salesman, of course, knowing in advance what the standard price of "Coca-Cola" was, would ask the dealer the price of "Coca-Cola" and then tell him that he could sell him "Koke" syrup, which was identical, at a very much lower price. He also had some stock scheme for giving away so much stock with so many gallons of syrup,—I have forgotten just the details of that. But he would ask the dealer

(Deposition of A. B. Freeman.)

this question: "Don't a great many people who come in here and ask for 'Coca-Cola' ask for 'coke?' "

[1431] In the majority of cases the dealer would say that they did, but that he, of course, always served "Coca-Cola"; so the salesman would tell them that their product was identical, that it was named "Koke," and that there was no reason why they couldn't serve "Koke" when "coke" was asked for and that if they would contract for a certain quantity of "Koke" they could save considerable in the price and they would also be entitled to some stock in the Southern Koke Company's business on the purchase of a certain number of gallons of "Koke." I asked him the question, "Didn't some of the dealers, though, suggest to you that that would probably be unfair, that they knew that the customers in calling for "coke" were using it simply as a nickname for "Coca-Cola?" He said that some of them did, but that the salesman would point out that their product was named "Koke" and that the dealer had no way of knowing whether they meant "Coca-Cola" or "'Koke" when a man called for "coke" and that they, therefore, would be doing nothing wrong if they sold him "Koke." He also stated to me about that time. "You fellows made a great mistake whenever you allowed the word 'Koke' to be trademarked;" and I said, "I don't think we did, Mr. Dalton, because I believe you will admit that the word 'Koke' was used by the Southern Koke Company merely as a word play on what they knew to be a nickname for 'Coca-Cola'," and I said, "You know that 'Coke' is

(Deposition of A. B. Freeman.)

a nickname for 'Coca-Cola'." He said, "Oh, yes, that's generally understood." "Well, then," I said, "I don't think they made a mistake in allowing that to be trademarked, because no business that's conceived in iniquity and born in sin will ever be ultimately successful"; and I said, "Probably that's one of the reasons why you got out of it,—you said you had several good reasons?" He didn't reply to that and the conversation took other lines, but when we went to leave he repeated that very quotation and said, "That's one of the reasons that I got out of it, I didn't think it was exactly the right kind of business to be in." We also had some conversation about advertising. He said that they did some little advertising, that he recollected it, and that the shipping clerk was instructed to ship out advertising with each order that the Southern Koke Company shipped out. He said he knew that there were some places in New Orleans that displayed [1432] "Koke" advertising, but outside of New Orleans he didn't know because he said he hadn't been through the territory.

Cross-examination by Mr. LITTLETON.

I was not present in the room when Mr. Dalton testified in this case, but I was present during some of the time when testimony for both parties was being taken.

I interviewed Mr. Dalton for the purpose of using him as a witness in behalf of the Coca-Cola Company and, notwithstanding the fact that *the* made this remarkable statement to me, he was not put on the witness-stand as a witness. There was no one else

(Deposition of A. B. Freeman.)

present when this conversation occurred except Mr. Dalton, Mr. Pierce and myself, the stenographer was in the front office. I saw Mr. Dalton with reference to this matter twice. These two interviews were about ten days apart. Mr. Pierce was present only at the first interview. There was no signed written statement made at the first interview, as he said he didn't want to be used as a witness, but a statement of the facts which he then told was written up and I called on him the second time to get him to sign that statement. He got very angry and said "I told you at the first interview that I had no friends to lose,—could make no friends by becoming a witness, and I stood a chance of losing some." He mentioned, also, that he was a candidate in some secret or other society and that he thought he might possibly injure himself if he became a witness, and that he didn't care to sign the statement, and didn't care to be a witness at all. He acknowledged, however, to what he had said, and that the statement was correct, but that he simply wouldn't be a witness. No, sir; he did not say that the only people he wanted to, or instructed his salesmen to go to, were "Coca-Cola" customers, I don't recall that he said that. This long statement I have just given was both a statement of what Dalton said that he had told his salesmen and what his salesmen told him they had done,—it was his experience in dealing with his salesmen during the time he was general manager. That part of it relating to instructions that he gave the

(Deposition of A. B. Freeman.)

salesmen, the line of selling talk, the line of argument that they should use, was his direct statement. [1433] That was the particular argument they used to off-set the fact that a great many customers in calling for "Coca-Cola" asked for simply "coke." I don't think that the instructions which he gave his salesmen when they went out to sell, say, a "Glee-Nol" customer, were touched on during the conversation. I don't recall that anything he might have told his salesmen when they went out to sell a customer of any of the other cola drinks was touched on during the interview. You ask what part of this was the statement of his salesmen,—the gossip I was telling about; well, he mentioned the fact that some of the dealers had said to his salesmen that they understood "Coca-Cola" was meant when "coke" was called for, and that he had then told them that they could say to them that as "Koke" was made on the original "Coca-Cola" formula and was a trade-marked name, there could be no harm in selling "Koke" to a man who came and called for "coke," even if the dealer knew that he was expecting to get "Coca-Cola" when he called for "coke" and had previously been served with "Coca-Cola" when he called for "coke." No, sir, that is not all that was said at both of these interviews. Of course, it isn't a *verbatim* report of every word that was uttered on both sides, but it was the principal facts that were brought out during the conversation. There were, of course, a good many things of a personal nature

(Deposition of A. B. Freeman.)

about the business that he was engaged in. No, this is not all I can remember that was said at either of these conversations. We spent probably thirty minutes talking about a Mr. J. C. Wright, who was at one time Vice-President of the company and who was made a party to this suit, in telling us that he thought we made a mistake, that Wright wasn't any longer connected with it,—a considerably long conversation took place about that. He said all this at the first interview, which occurred in July, 1914.

Yes, sir; I am the manager of the Louisiana Coca-Cola Bottling Company. You ask if the Southern Koke Company was a competitor of mine; I don't think that company ever bottled goods in New Orleans, but the bottler who bottled their goods was a competitor of mine in a way. **[1434]**

Redirect Examination by Mr. HIRSCH.

Mr. Dalton told me positively that if we wouldn't call him as a witness he would not appear as a witness for the other side. He requested that he be not called, and I told him I wouldn't call him, and Mr. Pierce agreed to that.

Mr. HIRSCH.—I wish to reiterate and repeat my request made at the end of the taking of the depositions in Birmingham, of counsel for the defendant, for the production of Mr. J. C. Mayfield, Sr., to give him an opportunity, as set out on yesterday, at Birmingham. I ask Mr. Littleton, counsel for the defendants, if Mr. Mayfield is in the city?

Mr. LITTLETON.—No, sir, he isn't.

(Deposition of A. B. Freeman.)

Mr. HIRSCH.—I wish to state that the transcript of the record in the case of the State vs. Melville Rice was received by me on or about the middle of May, 1915, from Birmingham, Alabama, and that it was only a short time before that that I had any knowledge of the existence of the transcript of this record and that I had no knowledge of it at the time Mr. Mayfield was on the stand in New Orleans.

Mr. LITTLETON.—I state on the record that counsel for the defendants had no knowledge of the existence of the record until they got to Birmingham, and that before the taking of this testimony is finished, we feel quite sure Mr. Mayfield will take the stand and explain that record.

Deposition of O. C. Turrell, for Plaintiff, (in Rebuttal).

O. C. TURRELL.

Direct Examination by Mr. HIRSCH.

Yes, sir; I have testified in this case before. You ask if I ever had a conversation with Mr. J. C. Mayfield during, or about, May, 1913, in regard to the advertising of "Koke"; well, this was in Dallas, in the plant of the Koke Company,—I think it's the Southern Koke Company. The subject, I believe, was put to Mr. Mayfield as to whether or not they did any advertising, and he said, "We do some" and pointed to the advertising matter on the wall,—there were three little placards you might call them. It developed in further conversation that the parent company, described as the Koke Company of Amer-

(Deposition of O. C. Turrell.)

ica, didn't pay for any advertising at all,—they may have gotten out specimens, **[1435]** but he wouldn't say that they furnished advertising for any of the Koke Companies. He said that they didn't furnish any advertising matter, and that it was up to what he described as the subsidiary companies to club in, as they saw fit, and get out whatever advertising matter they wanted. You ask if he said anything to me about not having to advertise "Koke"; he said that he didn't,—let's see,—that came about in this way: I asked him the point-blank question as to whether or not the demand for "coke" was not caused through the medium of the "Coca-Cola" advertising, and he said that it was.

(Defendants object to the recitation of these alleged conversations with Mr. Mayfield because not proper rebuttal testimony, in that no foundation was laid for them in the examination of J. C. Mayfield. Overruled. Exception.)

He also said that the "Coca-Cola" formula was originally compounded by Dr. Pemberton and that he owned three-fourths of the business,—whether he meant by "the business," the formula or the business otherwise, I don't know. But he said that Dr. Pemberton at one time sold his interest, one-fourth, to a man by the name of Candler, and that he thought, under the circumstances, that he still owned three-fourths of the "Coca-Cola" business, and he thought, for that reason, that he was entitled to any benefits that might be derived from "Coca-Cola"

(Deposition of O. C. Turrell.)

advertising,—in the marketing of the beverage "Koke."

Cross-examination by Mr. LITTLETON.

I am the superintendent here of the Pinkerton National Detective Agency. That's the agency which is employed by the Coca-Cola Company to gather evidence in this case against the various Koke Companies. I am the superintendent of the New Orleans office. I have no idea how many detectives the Coca-Cola Company has had employed on this case, because it was not handled from here,—we only undertook such work as we were instructed to do through the medium of our Atlanta superintendents. I supplied from my office probably as many as six or eight. I couldn't say definitely how long they were employed and I don't want to be guessing at it, but we have been working on it off and on,—oh, I should say, since 1912. **[1436]** In order to get a complete record it would be necessary to go into our method of handling and detailing operatives and all of that sort of thing. One of the primary instructions issued to our detectives was to ferret out cases of substitution, where "Koke" had been substituted for "Coca-Cola" and they have been actively engaged at that work off and on since about 1912. The number of men I have mentioned, are just those I have supplied from my office. Of course, I have no knowledge of the number supplied from the Atlanta office and from Chicago and elsewhere. This conversation I had with Mr. Mayfield was held in Dallas

(Deposition of O. C. Turrell.)

on May 15, 1913, at the plant of the company. One of our operatives, C. J. Woodman, connected with the Houston office, was present. That's not a detective employed from my office here. He is another one in addition to the six or eight that I had employed here. In addition to Woodman, there was present, part of the time, a man by the name of Boyd, who was in some way connected with that company. He was present during part of the conversation I have related. No, sir, I did not approach Mr. Mayfield under the false representation that I was an advertising man. Operative Woodman was there and approached Mr. Mayfield under the pretext of being interested in the purchase of some subsidiary company,—that is he was selling territory, you understand. Woodman approached Mayfield first and called on him on several occasions. Under the pretext, as I have stated, of being interested in arrangements to buy certain territories which Mayfield was going to sell,—for instance, we would let a territory to New Orleans, Chicago, Dallas, Atlanta, Jacksonville and the surrounding country,—you understand what I mean, and they would form what they would call subsidiary companies. Woodman was approaching Mayfield with the idea of giving Mr. Mayfield the impression that he was interested and would like to make arrangements to start a subsidiary company at some place in the United States, and Woodman was supposed to bring me forward as the man with money sufficient to promote the enterprise.

(Deposition of O. C. Turrell.)

You ask if I was the great "Eastern Capitalist"; well, I was introduce as having sufficient money to start the proposition. Yes, sir, it was exactly the 15th day of May, that this conversation occurred, because I was **[1437]**

it was pretty much on the same idea,—pretty much on the same. (Same objection by plaintiff. Overruled. Exception.) Some of the bottlers used the Crown Cork and Seal Company's seals,—and some used seals from other cork concerns,—other cap bottles. (Same objection by plaintiff. Overruled. Exception.) No, sir; I didn't put any labels on the bottles. (Same objection by plaintiff. Overruled. Exception.) You ask if there was any name blown in the glass in the bottle; why, some of the bottles had the names of the bottler on them and some had no names on them. (Same objection by plaintiff. Overruled. Exception.) You ask if I think a casual purchaser could tell the difference between my product and "Coca-Cola" by the color; well, mine is a good deal darker, almost as dark as root beer. (Same objection by plaintiff. Overruled. Exception.) (The witness was asked if he could tell the difference between a glass of his product, "Queen-Ola," poured into a glass and a glass of, say, "Rye-Ola," but he did not answer the question.) You ask why I color my drink with caramel; most of these drinks are colored that way. (Same objection by plaintiff. Overruled. Exception.) I colored my drink with caramel because it looks good that way,—

(Deposition of O. C. Turrell.)

and you can't detect a fly or bug that might be in it,—one good reason. (Same objection by plaintiff. Overruled. Exception.) You ask if that applied to my drink; I couldn't say about that, other people do the bottling part, but the syrup though, it doesn't apply, of course, though possibly one might get in it sometimes. (Same objection by plaintiff. Overruled. Exception.) You ask why I colored it that color instead of pink, green or some other color; it's just customary for it to be colored that way. (Same objection by plaintiff. Overruled. Exception.) I couldn't tell you why it is customary for it to be colored that way. (Same objection by plaintiff. Overruled. Exception.) I couldn't tell you whether or not everybody that bottles a drink like that colors it that way. (Same objection by plaintiff. Overruled. Exception.) You ask if I have ever seen a drink of that sort that was not that same color; there's some darker than others, but they are all about the same general color, oh, yes. (Same objection by plaintiff. Overruled. Exception.) Some of them are light, some very dark, and some medium. (Same objection by plaintiff. Overruled. Exception.) **[1438]** You ask me to explain what I mean by that, by comparison, and you ask if I ever saw a Cola drink that was, say, the color of ginger-ale; I don't know that I ever did. (Same objection by plaintiff. Overruled. Exception.) You ask if I ever saw a Cola drink that was absolutely black; I have seen some pretty black, yes, sir,—very dark,

(Deposition of O. C. Turrell.)

yes, sir. (Same objection by plaintiff. Overruled. Exception.) My drink tastes like a drink of its own; I have never tasted one that tasted exactly like it, I have never drunk one that I thought tasted like it. (Same objection by plaintiff. Overruled. Exception.) No, sir, mine is not a caffeine drink. (Same objection by plaintiff. Overruled. Exception.) I have no caffeine in mine. I put a little bit in it at the start, but I found it was all foolishness to use that,—it was too expensive. (Same objection by plaintiff. Overruled. Exception.) The volume of my business in "Queen-Ola" was very small. (Same objection by plaintiff. Overruled. Exception.) I don't think I ever had over three bottlers. I had one good bottling plant that was using right smart and two other one horse concerns buying possibly a half barrel once every month, and, sometimes, once every two months. (Same objection by plaintiff. Overruled. Exception.) No, sir; I never did get out any advertising for my product, nothing but,— well, I did get out some cards at one time and sent them out to a bottling plant I had here,—"Drink Queen-Ola" is what it was. (Same objection by plaintiff. Overruled. Exception.) No, sir; the general public does not know about my drink being on the market, very few people know of it,—in fact, it isn't on the market at all now. Possibly a few of the general public knew it was on the market when it was being made, but it wasn't generally known because I had only a few bottling it. No, sir, I don't

(Deposition of O. C. Turrell.)

know how my drink was sold at soda-fountains; I never sold but a few fountains. (Same objection by plaintiff. Overruled. Exception.) No, sir; I don't know how it was asked for by the consuming public nor do I know how the bottled goods were asked for by them. (Same objection by plaintiff. Overruled. Exception.) The reason why I happened to testify in this case is because I was summoned here. Yes, sir; Mr. George Bodeker, the gentleman sitting here, and Mr. Pierce, saw me with reference to my testimony before I was summoned. [1439]

there only one day. I went there from Houston, where I happened to be relieving the Houston superintendent. You ask if it would surprise me to know that Mr. Mayfield at that time was in Chattanooga, Tennessee, attending the Confederate Veterans' Reunion; it's out of the question that he wasn't in Dallas at that time, because I know him,—I have met him since and I know him. That was J. C. Mayfield, Sr. The substance of his interview was that the Koke Company of America did not do the advertising, but that the subsidiary companies advertised if they wanted to, it was a matter of their clubbing together. He explained to me that the subsidiary companies were the salesmen companies,—the ones that dealt with the public, that is the dealers,—they were the ones that sold the finished product to the dealers. They were practically separate organizations, but in a measure under the control of the parent company. I don't think he said he bought

(Deposition of O. C. Turrell.)

the Coca-Cola formula from J. S. Pemberton, but he did say he originally owned three-fourths of the original business. You ask if he didn't tell me, as a matter of fact, that he owned it in the Pemberton Medicine Company and that there were three others besides themselves in that partnership, namely: J. S. Pemberton, A. O. Murphy and Bloodworth; no, if you'll permit me to refer to my report, I will read just exactly what he said, but he didn't go into any detail like that at all.

(The following depositions were taken by the plaintiff in rebuttal at Dallas, Texas, on June 4, 1915:)

Deposition of T. J. Haizlip, for Plaintiff (In Rebuttal).

T. J. HAIZLIP.

Direct Examination by Mr. ROGERS.

[1440]

I am forty-two years of age; I live at Fort Worth, Texas, and am a druggist, having a retail drug-store. I have been in the retail drug business in various and sundry capacities, I will say, ever since the spring of 1893. My first experience in the drug business was, to the best of my knowledge and belief, say about the 1st of June, 1893, with the firm of Bitting and Andrews, of Sherman, Texas. The full name of the Bitting who was the member of that firm is W. L. Bitting. My duties while I was with that firm were to deliver prescriptions, sweep and mop the floor,—just general roustabout, served a little soda water—

(Deposition of T. J. Haizlip.)

just general lackey boy for the drug-store. I was with Bitting and Andrews from June until about October, or possibly November, 1893—it was some time during the fall when they sold the store. I left at that time. Bitting and Andrews handled "Coca-Cola" during that time. To the best of my knowledge they got a barrel—I don't know what size this barrel was, but it was more than what we term a keg; it might have been either a thirty, or might have been a sixty,—but anyway, it was what they term a barrel of "Coca-Cola," from Atlanta. That was some time in the summer, I will say, of 1893. That was dispensed from the fountain at Bitting and Andrews store in 1893. If my memory serves me right they dispensed the entire barrel of "Coca-Cola" and they also had the exclusive right to sell "Coca-Cola" in the city of Sherman, and no other druggist had it at all during that year, if I am right. The biggest part of that Coca-Cola was dispensed over the fountain as a beverage. Usually it was asked for as "Coca-Cola"; there was a good many times when they just presented those little tickets which somebody had handed them—given away in the City when this barrel of "Coca-Cola" was purchased by this firm— **[1441]** and the person presenting them would lay down the ticket and say, "Well, I see you have these goods here," and we would serve them "Coca-Cola" on the ticket. As a rule they didn't ask for it, but, when they did ask for it, if my memory serves me right, they asked for "Coca-Cola." You

(Deposition of T. J. Haizlip.)

ask if any nicknames were used at Bitting's fountain at Sherman, Texas, during the year 1893 by the public in asking for "Coca-Cola"; I can say there was a few who called for "coke." To people who asked for "coke" during the summer of 1893, I served "Coca-Cola." I always took the name "coke" to mean "Coca-Cola."

(Defendant objects to the questions and answers with reference to the word "Coke" because not proper rebuttal evidence, and they moved to strike the questions and answers with reference thereto; objection and motion overruled. Exception.)

After I left Bitting and Andrew in the fall of 1893, I went to work for another firm on the north side of the square,—Mr. Perguin,—I believe he was a German—he had a drug-store there at Sherman Texas. I returned to Mr. Bitting in the early part of 1896,—I am not positive, but probably about March. On this occasion I stayed until some time in 1898—just a little more or less than two years, I am not exactly positive with regard to it. At that time I was prescription clerk, and also had something to do with the soda-fountain. Mr. Bitting was serving "Coca-Cola" at his fountain at that time and I dispensed it. If my memory serves me right, the public usually asked for it as "Coca-Cola"—I don't remember the word "coke" being applied to it much [1442] at that time, it might have been, however. You asked what I understood by the name "coke" at that time as applied to soda-fountain beverages;

(Deposition of T. J. Haizlip.)

well, I understood that they meant "Coca-Cola." W. L. Bitting had the exclusive right in 1893 to sell "Coca-Cola," but after that year the Coca-Cola Company sold "Coca-Cola" to every soda-fountain that would buy it, regardless of giving Bitting any right as to how much they should have—in other words, because Mr. Bitting couldn't have the exclusive right, he got mad and said he could "make himself some of that blamed stuff, anyway," and during that time he attempted, to my mind, several times to make it, all of which, if my memory serves me right about it never was used—they never would drink it, they refused what was set out to them, and oftentimes he would then laugh and give them the genuine "Coca-Cola." Mr. Bitting didn't make up but just a little of it at that time—a bottle of it at that time—and handed it to his friends, and asked "wasn't it a pretty good imitation of Coca-Cola." Oh, yes, he tried to sell some of it over the fountain in response to calls for "Coca-Cola." When people came in and asked for "Coca-Cola" he would try to sell them that product of his as "Coca-Cola." The result was they would take a case (glass?) of it and set it down, and he would laugh and give them "Coca-Cola" and say, "I was just trying to see if I couldn't substitute on this "Coca-Cola." That was in 1896 or 1897.

(Defendants object to the foregoing testimony because not proper rebuttal evidence, and no foundation was laid for it in the examination of defendants' witnesses, and they move to strike the said testimony.

(Deposition of T. J. Haizlip.)

Objection and motion overruled; exception.) [1443]

During the time I have testified about concerning my first employment with Mr. Bitting in the spring and summer of 1893, there was no drinks other than "Coca-Cola" of similar character sold there in Sherman, Texas, nor was any drink of similar character being advertised around Sherman. I think I can answer that, being positive; there are some few things, however, that I may not be absolutely correct in—so far as Mr. Bitting trying to make "Coca-Cola"; but I know positively that Mr. Bitting did attempt to make some kind of drink, but whether he gave it any name, or whether he tried to put it out as "Coca-Cola," I cannot be exactly correct, owing to the length of time it has been since that occurred; but I know very well I have seen him experimenting, and I know that he tried to make "Coca-Cola," or "Koke," or some kind of drink, now, whether he called it "Coca-Cola" or tried to serve it as "Coca-Cola"—but that was just a few times, possibly,—he didn't try it more than a dozen times. He didn't work it as a rule, it was just merely, you might say, if anything,—well, in his leisure hours, he might go back and make up a bottle and try to sell it, maybe a dozen times. He didn't do it as a business, however, I will say that positively.

Cross-examination by Mr. LITTLETON.

I was about twenty years old when I went to work for W. L. Bitting. That was the first work I had ever done. At that time the soda-fountain industry

(Deposition of T. J. Haizlip.)

had not spread out like it has at this time. There were just a few fountains here and there, and a few drinks only were served. They didn't even serve ice-cream; they had just a few, such as **[1444]** strawberry and vanilla syrups, a few things like that—and they served those just with the foam on top of them, and then they served "Glass-Ade," which was just a little syrup with the ice on top of it, and people came in and ate it with a spoon. Mr. Bitting was the first one to handle "Coca-Cola" in and about Sherman. That is the first I knew of "Coca-Cola." On that question I am quite positive. I know Mr. Bitting had the exclusive right to "Coca-Cola"—I remember that very positively; and he bought the first barrel, and I remember the man who sold it to him—I don't remember his name, but he was a big, well-grown-up, fellow, I remember. I have been in the drug business continuously in various capacities ever since 1893. I have been on the road—sold pharmaceuticals on the road,—and have been in the wholesale business as a clerk, but mostly I have been in the retail business ever since. You ask when I first began to think back, and when my attention was first directed to this nickname for "Coca-Cola"; well, I don't know that I can answer that kind of a question. It seems to me that —I really don't understand what you want. I was first approached with reference to testifying in this case by some man who came to my place of business in Fort Worth about two years ago, and asked me if Bitting ever made "Koke" and I says "Not that

(Deposition of T. J. Haizlip.)

I know of"—just talking—so he took down a few little dots. He was a friend of mine and I didn't think anything about it, and he went on away; so last summer there was somebody—I have forgotten who it was—came over and asked some questions. He was a lawyer from Fort Worth, and claimed to be representing the Coca-Cola Company, and asked me if I worked for Bitting. I **[1445]** told this person who called on me two years ago, that if Bitting made "Koke" it wasn't within my knowledge. Now, I say this, you must remember that has been more than twenty years ago, and as I now remember it, when I first went into the drug-store, being a green country boy right off of the farm, he might have made some things that I wouldn't know whether he was making ginger-ale, or "Coca-Cola," or what, but if he did I don't remember it. You asked if there was not a time that I do know that he was making a product and labeling it "Koke" on his bottles; no, it wasn't labeled, he was just experimenting, and as to how many times, or how much of that he made, as I remember, it was probably a quart, and he tried maybe to dispense it once or twice, but whether he had any name for it or not, I couldn't say. After he would hand it to different customers he knew real well, he would set it down and laugh and serve them real "Coca-Cola." You ask, what I suppose he wanted to get a label registered in the Patent Office for if he wasn't going to use it.

(Deposition of T. J. Haizlip.)

(Objected to by plaintiff as improper cross-examination. Overruled. Exception.)

I will tell you how that happened; C. B. Randall told him, "Billy, why don't you have that damned thing patented?" No, I didn't hear that. (Objected to by defendant as hearsay. Overruled. Exception.) Randall said "Billy, why in hell don't you have that thing patented?" He says, "Why?" He says, "Why, it may be worth something to you some day," and that was the beginning, as I understand, of Bitting thinking of having it patented. Now, this man **[1446]** who called on me two years ago and asked me if I had formerly worked for Bitting. I told him I had, and then he asked if Bitting ever made "Koke," and I told him that he did not within my knowledge. He asked if I did'nt use to sell something that he called "Koke" which was a combination of cocaine and acetanylid. I said, "Yes, I sold a many a quarter's worth of it, but if I ever sold a drink called "Koke," I don't know it." I sold this preparation of cocaine and acetanylid to people who asked for "Coke," I would say a thousand times. They would come in repeatedly and say, "Give me a dime's worth of 'Coke,'" and, when they came to the prescription case and called for a dime's worth of "Coke" I had this combination in a box—he put it up himself—and I had it in a little bottle and dispensed it according to his directions; but when they came to the soda-fountain and got it, saying, "Coke" up there, then we dispensed "Coca-Cola." The substance of the conver-

(Deposition of T. J. Haizlip.)

sation between me and this gentleman who called on me two years ago with reference to the drink that Bitting was making, was about what I have stated, that is about all of the conversation that took place at that time. The conversation which I had with the representative of the Coca-Cola Company about a year ago was about the same as that which I have just stated. Those are the only calls I have had with reference to testifying in this case, until I was called over here yesterday. My attention was first directed, and I was first asked with reference to the word "Coke" being a nickname for "Coca-Cola" just after I came to the office this morning, and when I arrived here. However, I had been knowing "Coke" ever since **[1447]** the first "Coca-Cola" that I ever saw which was sold by W. L. Bitting. I have heard the word "Coke" applied to the drink at various and sundry times and places all along ever since that particular time. The first time anybody ever asked me the meaning of the word "Coke" was when Lee McAfee come to my store to see me some two years ago. The truth of the business is, when I first went to work with Mr. Bitting in Sherman in 1893 he had never seen any "Coca-Cola" that I know of. He bought it during that summer of 1893, but when I first went with him there was no "Coca-Cola" in the store, and none had ever been sold in Sherman, and I had never heard of it. Bitting had the exclusive sale of "Coca-Cola" during that season only. The next year he was in Paris, Texas, and the next year after that

(Deposition of T. J. Haizlip.)

he came back to Sherman and wondered why he couldn't have the exclusive sale again, and that was the time he experimented a little. The drink that he was making, whatever it was, was similar to "Coca-Cola." He intended to make "Coca-Cola," but he didn't have his formula worked out, and his customers wouldn't have it. I don't know whether he continued to make it or not. I left him in the spring of 1898 and have never worked for him since. Whether he ever done anything more about it or not, I wouldn't know, you see. I am not positive whether he was experimenting with the drink along about 1893 or 1894, I rather think that that was in 1896. I wouldn't give positive testimony about that because of the time back. It is a long time ago and it is hard to remember, but I rather think it was not in 1893, because he was satisfied with his surroundings at that time, and was having a reasonably good sale of the goods he bought and **[1448]** everything was moving all right, but after that when he felt he ought to have the exclusive sale again, he then experimented to some extent, but I don't know of him calling it "Koke" and I never heard of him calling it "Koke"—he may have, you understand. You say, this is not my absolute recollection; that it is what I say now that I think must have been; well, I cannot tell these things that far back and be specific. As my memory serves me, there were a few times that the boys would call at the store during the summer of 1893, and call for some "Coke" laughingly and jokingly, thinking

(Deposition of T. J. Haizlip.)

it was something smart. I wouldn't be positive whether that was 1893 or 1896. I believe I could fix the date when that occurred within five years. I have been calling it "Coke" myself ten or fifteen years, I remember specifically and positively. I have been in Fort Worth ten years this next October, and I remember specifically and positively of going over here to Terrell and sitting down at a soda-fountain with a doctor friend of mine, and he called for "coke" and I asked him "Are you taking cocaine," and he laughed and says, "That boy knows what I want." Now, I happened to remember that because I just happened to be in the store and I was acquainted with this particular doctor friend. I have been calling for it as "coke" fifteen years. Yes, the word "coke" has a rather sinister meaning to it, like "dope." People use it as cocaine. They call for "coke" at my fountain even yet. I have customers who call it "dope"; some come to my fountain and call for "dope" and I have the boy to serve "Coca-Cola." I would say that the word "dope" was originally applied to narcotics—cocaine, morphine and such things, that **[1449]** is, the first time I heard it. I don't know whether that is true also of the word "coke" or not. I don't know anything about whether that is true or not. I don't know anything at all about why people apply this word "dope" and "coke" to "Coca-Cola"; I have no right to suppose anything on that line. Whenever a man came to my fountain and said, "coke," I inferred that he meant "Coca-Cola," be-

(Deposition of T. J. Haizlip.)

cause it was said—I don't know whether it is true—that it has cocaine in it. My idea as to why they thought it had cocaine in it is because it was in the newspapers,—the press gave it out that the United States was not going to allow the soldiers to use it —that is the only reason that I know of,—for the reason that it showed a percentage of cocaine. There was an article in the paper some several years ago that the Government was not going to allow the soldiers to use it any more on that account, and finally it blew over and that has been long done. I don't know where it originated, or whether there is any foundation for it, but we all know they have accused "Coca-Cola" of being doped and when we apply "dope" we think of cocaine and morphine—opiates, things of that kind,—that is my idea of it. Oh, yes, when I heard this drink called "Coca-Cola," that name conveyed to my mind the idea that the drink had coca in it,—coca leaves. (Plaintiff objects to the question and answer as being improper cross-examination and not called for by the direct examination, and moves to strike the question and answer; objection and motion overruled. Exception.)

Yes, sir; as a druggist I also knew that cocaine came from coca leaves. (Plaintiff objects to the question and answer for the same reason and moves to strike the same; **[1450]** objection overruled. Exception.)

I have never dispensed any of the other cola

(Deposition of T. J. Haizlip.)

drinks. (Same objection and motion by plaintiff. Overruled. Exception.)

I bought some "Fan-Taz," but I have never bought any other "coke" or "dope" or "cola," or any of these things. I have had them offered—there is not a month during the season that I have not an opportunity to buy those, but I didn't buy them for the reason that I felt I was satisfied with the margin I was getting out of the other, and maybe the customers would think I was trying to flim-flam them, or something, so I just went right on and sold them "Cola-Cola." I have never tried to dispense any of the other beverages, but I have drunk it at the other soda-fountains. Yes, I know the different names by which the public, the consuming public, asks for these other beverages; they usually call for "Coke," I think. Yes, they call for all of them as "Coke," and put them all in the same class with "Coca-Cola." You ask why I think that, and if it is because I think these other beverages are doped up too; well, in my opinion—I am only giving my opinion, as a matter of fact: that is as far as it goes—when they are calling for "coke" or "dope," they are thinking of "Coca-Cola." The reason why I say that is because I have been selling "Coca-Cola" ever since 1893, with the exception of possibly two or three years that I was not in the retail business and during all of that time people, as a rule, when they called for "dope" and "coke" and all these—sometimes they would come in and say "Give me a shot"—well, I served them "Coca-Cola," and, to my mind that, is what

(Deposition of T. J. Haizlip.)

they have in mind **[1451]** when they call for any of these things; now, I may be wrong, but that is my version. That is my opinion, because I have handled nothing but "Coca-Cola" all the time; and dealt in that product exclusively.

The other products are very similar to "Coca-Cola," if I understand it correctly; in other words, personally I cannot tell the difference between them. No, I don't think that the public has the idea that the other drinks are made pretty much in the same way, or made out of dope, too. To my mind, ninety per cent of the public who call for "dope," "coke," "shot," and the like, don't know but what it is all original "Coca-Cola," and don't know there is another drink like that being manufactured. I have never made any tests to ascertain just what they do mean, but a short while ago my druggist walked out to serve a man a drink who had asked for a "Coke" and the druggist, to get it right, asked, "Do you mean 'Coca-Cola' ?" and the man said, "Don't get fresh with me, go ahead and serve me," and the young man undertook to explain there was a "koke" on the market, but he got very indignant and said he didn't come in there to be jollied by a soda jerker; he wanted to be served and said he was busy, and went on. I thought I would step up and explain to him about it, but I thought it over and decided he must be a fool and that I wouldn't talk to him. No, it is not well known that my store handles "Coca-Cola" exclusively and none of these other beverages, that I know of; I don't advertise anything to that

(Deposition of T. J. Haizlip.)

effect. In fact, I don't advertise it at all. I have, however, a "Coca-Cola" sign on my door. You asked why I suppose people would apply the name "dope" to one dope and not apply it to all the other dopes; well, I have an idea they apply it to all **[1452]** the other dopes. Yes, they put them all in the same class, if they know there is another dope. I know people who would come in and say—if they asked somebody to take a drink—"Do you drink 'Coca-Cola' or do you drink 'Koke'? Well, it's all dope, anyway,—what's the difference? So go ahead, I'll drink with you." The fact of the business is, a few of the people don't care what they get, so long as the drink produces the effect which these cola drinks produce, but a majority of them, I think, prefer the original "Coca-Cola." You asked what difference it makes to them if they cannot tell the difference in the taste; that is for them to answer. I don't know why, but I know they feel very friendly toward that,—perhaps because of the trademark, or something—those who know—but those who don't know feel perfectly satisfied. I drink it myself and feel satisfied. No, sir, I do not have any advertising in my place asking the public not to ask for "Coca-Cola" by nickname; but to ask for it by the full name, and have never had any advertising of that kind, nor have I seen any advertisement of that sort. Yes, I have seen "Coca-Cola" advertised in the papers asking the public to "Demand the genuine by the full name, nicknames encourage substitution," but I have no advertisements in my store for

(Deposition of T. J. Haizlip.)

anything,I don't like it. I am not positive whether I have seen "Coca-Cola" advertisements, "Demand the genuine by full name and avoid disappointment," or "Demand the genuine by full name, the wise do likewise." I wouldn't be positive whether I have seen "Coca-Cola" advertising anywhere in which the public are urged not to ask for "Coca-Cola' by any other name, but to ask for it by its full name, "Coca-Cola." I have a "Coca-Cola" [1453] advertisement on the wall of my building, for which I get paid. I have had lots of people to come into my store and ask for "coke,"—I don't know whether they called it "k-o-k-e"—but I have lots of people to ask for "coke." I have had people to come in and ask for "coke" and demand "k-o-k-e." They were working for the Koke Co. There was a lady one evening came in and I served her myself. She says I want "Koke," and I served "Coca-Cola," and when I went to serve this "Coca-Cola" at the table, she says, "Is this 'Koke'?" and I says, "No, Ma'am, we have no 'Koke,' but 'Coca-Cola.'" And she says, "I didn't ask for 'Coca-Cola,' I asked for 'Koke.'" I says, "I beg your pardon, but we have not got it." She says, "You might have said so." Incidentally, in a few minutes I found out she was working for the "Koke" Company, and that was one time in my life Koke was demanded of me. That occurred in my drug-store at Forth Worth last summer. I don't know who the young lady was.

When I was working with Bitting in 1893, W. L. Bitting and H. G. Bitting and myself were, I think,

(Deposition of T. J. Haizlip.)

the only clerks about the store at that time; I don't know of anybody else ever dispensing cola drinks during the time I was with the firm. Well, now I don't know what nicknames the public commonly apply to other cola beverages at the fountains where they are served, or what beverage they want when they ask for "coke" and "dope" at other fountains. I have just taken the version that when a man says "coke" or "dope" he means "Coca-Cola." I may be wrong. I have handled "Coca-Cola" exclusively, because I thought it was good business to do so. I have had a drug-store of my own nine years last October. Mr. Andrews, who was associated with Bitting, died here in Dallas. I have no contract either with the Coca-Cola Company, or with the jobber; I buy where **[1454]** I please; I don't ever enter into contracts at all. I never have gotten any rebate at the end of the year, because I don't sell enough of it. I understand the Coca-Cola Company has an agreement providing that if you agree to buy as much as one hundred gallons through the season, they will rebate you to where it will cost $1.50 per gallon. The "Coca-Cola" salesman put such a proposition up to me. I pay $1.50 a gallon for my "Coca-Cola," although I don't use the quantity required to get that rebate. I don't know what price their customers pay who use a larger quantity and get the rebate, but I understand they get a discount. I will correct what I said a while ago, I pay $1.65 per gallon. Yes, the "Coca-Cola" people have shown me the contract they wanted me to sign so

(Deposition of T. J. Haizlip.)

as to induce me to get the rebate. Well, no; no, I don't know about that; I know different salesmen have come and asked me—I don't know that I have had one this year—and ask for my "Coca-Cola" business. I understand that it costs $1.65 in barrels, and, if you sell as much as one hundred gallons during the season the rebate is fifteen cents per gallon. I know it is not a part of that contract that you are not to handle any of the other cola beverages. I have not seen the contract. They pull them out and lay them on the counter, but I don't read them, but that is my understanding. I cannot make a positive statement about it, but it is my understanding that, if you use as much as one hundred gallons, at the end of the season that they will give a rebate to an amount that will make the "Coca-Cola" cost $1.50 per gallon. That would be about two barrels that I would have to use to get the rebate. I rarely use that much in my concern, therefore, [1455] I don't sell a great deal of "Coca-Cola." I am pretty sure that I have not sold as much as two barrels a year. I have never heard the "Coca-Cola" salesman or representative say anything about any of the other cola drinks. No, sir; I have never tried to sell "Koke" myself; I have never bought it. [1456]

Deposition of W. D. Smith, for Plaintiff (In Rebuttal).

W. D. SMITH.

Direct Examination by Gen. CRANE.

I am the editor of what is known as the "Weekly

(Deposition of W. D. Smith.)

and Monthly Pitchfork," of which I have been editor since it started, nearly eight years ago. My friends have spoken of an article which appeared in the "Pitchfork" on April 24th, 1912, containing an article criticising the substitution of "Koke" for "Coca-Cola" by the dispensers at various places. I remember having written such an article, and, in fact, two or three of them. You ask how I happened to write the article—whether it was at the suggestion of the Coca-Cola Company, Mr. Candler, or anybody for either of them, or whether it was on my own initiative, or my own motion. (Objected to by defendants because the question is leading and suggestive; overruled; exception.) May I be permitted a little latitude, in answering that in my own way? I feel I am due a little latitude, because the very fact of my being summoned here is rather an insinuation that I might have been paid for it and that my convictions might be for sale, and, of course, I resent such implication as that. I wrote that article, and one or two articles on the same line, prompted only by the most conscientious motives, and it is in general line of my editorial policies. My paper is not a newspaper, it is a paper devoted to my own editorial comments, and I comment as I please, and, occasionally, I jump into some things that I don't think are exactly right,—morally right, etc. I didn't think the conduct of the Koke Company was in line with the best moral or commercial ethics and I wrote an article attacking them for the same reason that I wrote an article attacking the fake spearmint gum

(Deposition of W. D. Smith.)

people here last October— **[1457]** namely, because I considered it commercial vandalism. The article was inspired by nobody on the face of this earth. I wrote it because I felt like I ought to write it, and I wrote it like I thought it ought to have been written. That article was not paid for by anybody, I don't get pay for my editorial papers.

Cross-examination by Mr. LITTLETON.

I have carried "Coca-Cola" advertising in my paper about six years. I have never had any "Koke" advertising in my paper,—I should say not. You ask if I am not a lawyer; I think that is impertinent. I am trying to live right. I don't see why you should ask me any such question. You say that you don't think it is a reflection on anybody that he was once a lawyer, and you ask if I consider that a reflection; some kinds of lawyers, I do; yes, sir. You ask if I consider it a reflection to be the kind of lawyer that I was; I think I was a pretty good lawyer; I was good enough to quit; I never saw anything to it. If I am forced to answer, I will have to admit that I practiced law. No, I didn't belong to that class of lawyers that it is a reflection to admit that they were that kind of lawyer; I belonged to that class of lawyers that was decent enough to quit it. I found—if your question is relevant—I found that, as a young lawyer, the better class of lawyers, the older lawyers, had gotten the better class of business, and, in order for me to live, I would have to do more or less shystering, representing clients that I couldn't conscientiously represent, so I quit and

(Deposition of W. D. Smith.)
went to work for a living. No, sir; I didn't know anything about the "Koke" [1458] business before it started here; neither did I know how long they had been in the business; nor did I know whether or not they had preceded "Coca-Cola" into the field. If as a matter of fact they had preceded "Coca-Cola" into the field, and had adopted the name of "Koke" for their product prior to the time the Coca-Cola Company had adopted the name "Coca-Cola" for its product, I certainly would still have considered that they were a fraudulent scheme, for the reason that advertising is an asset—there is no more valuable asset to a man or business than a good name,—a well known, good name,—which "Coca-Cola" has succeeded in achieving or acquiring for itself by much effort and by the expenditure of much money; and the Koke Company may have been here ever since Noah's Ark, for all I know, but they certainly had not gone to the trouble to advertise themselves and make themselves known, and, whether they antedated "Coca-Cola's" existence or not, it was plain to me they were attempting to steal the Coca-Cola Company's good name. I am not trying to argue the "Coca-Cola" case into the record; I am trying to get you to see the infamy of the thing. I first learned of this infamous scheme being perpetrated on the good people of Texas when these soda-fountains commenced stealing from me,—taking my nickel for a product that I didn't call for. As soon as I tasted the substitute I knew it wasn't "Coca-Cola. I could tell right off that it wasn't "Coca-

(Deposition of W. D. Smith.)

Cola." I certainly could. It fooled me the least bit—it is a tolerably fair substitute—but anybody who knows what "Coca-Cola" is can readily tell the difference. I don't believe I ever did see any advertising of the Coca-Cola Company advertising a product by name "koke" or "dope." I have been making [**1459**] attacks on such products as "Spearmint" and "Koke" for eight years, and I have developed quite a "rep." along that line. No, sir, I was never a preacher, and am not a minister now,—I am sort of a preacher, educated for the ministry. I have been conducting this "Pitchfork" ever since I quit practicing law. You say that you notice in this article which I wrote in the "Pitchfork" that I refer to a number of dealers who, I said, were handling "Koke," and you asked how I found out how those people were handling "Koke"; well, I don't believe it is necessary—I don't believe you can force me to tell how I find out what I know. I have a few ways of my own of getting information—it is one of my assets as a publisher. I refuse to answer that question. I will refuse to answer that question as to how I got my information. I don't think it concerns either side of this case, whether a little bird told me, or whether my mother-in-law tipped it off to me. I believe it is sufficient for me to know it. I am not going to tell you unless I have to. I am not ashamed of the way I found it out. I am satisfied you would like to know how I found it out; I would like to know how a lot of things going on in this town right now, but I cannot find out; the people who

(Deposition of W. D. Smith.)
know won't tell me, and I will have to pursue some other tactics. I still decline to answer your question; I think it is impertinent. I am satisfied you don't care what I think about it. I certainly do decline to answer it. I have already told you positively that I am not going to tell you my system of acquiring information—you think I am going to admit I have got a sleuth or a brace of private detectives? You ask if I have, as a matter of fact, got a brace of private detectives [**1460**] going around to ferret out the evils in my community for me to spread broadcast in my "Pitchfork"; not regularly paid detectives; I am in touch with several agencies. No, sir, not the Pinkerton's. I never have had anything to do with the Pinkerton's. I have had a lot of dealings with the W. J. Burns people. I refuse to answer that question as to whether or not I have had dealings with them with reference to these particular "Koke" people. You might put Mr. Dan Lehon, in charge of the New Orleans office, of the W. J. Burns agency, on the stand. I discovered the awful iniquity this Koke Company was perpetrating on the people of Dallas and surrounding country two or three, or four years ago, about the time I wrote the first article on them—this article you have reference to here was not the first article, I think I had written an article or two previous. I don't think I have the files of my paper back from the time I begun, some of them having been destroyed. I always try to keep a file, but I have been interrupted a time or two and my file has been broken. I would

(Deposition of W. D. Smith.)

be very glad to make a search of my files to see if I can find the other copies containing the other articles that I wrote about "Koke." The article you have seen is in line with the other articles, the general idea being that the "Koke" people are attempting to use the nickname usually applied to "Coca-Cola."

If it is of so much importance, I will tell you on the quiet, how old I am—I would rather you wouldn't say anything about it; I am trying to keep it from my wife—thirty-one years old; I don't know what she would do if she found out that I am thirty-one years old, she would probably [1461] make me drink "Koke" all the rest of my life.

You again ask how I got my information that the places I referred to in my article in the "Pitchfork" were not handling "Coca-Cola," and you say it strikes you as a little peculiar that I would be hiring detectives to look into affairs of the Koke Company for the purpose of exposing them in my article, and that no doubt I spent my own money to get up this information; I see your point, and I will state categorically that I never spent a dime in getting my information regarding "Koke." I never attacked in my paper any of the other cola drinks that are on the market. The fact is, since I have been running my paper the only substitute I have run across for "Coca-Cola" was "Koke." All the people in Dallas who serve "Koke" are crooked dealers to that extent, without a doubt. I want to say this about Mr. Sanger, of Sanger Brothers. I am under no obligations to Mr. Sanger, but I have always considered

him to be a man of unimpeachable integrity, and I personally have felt very badly over finding that he was substituting. I won't say that Mr. Sanger is a crook or a crooked dealer; what I say is that if he was aware of the injustice he was doing the Coca-Cola Company, and the injustice he was doing the "Coca-Cola" drinkers—myself,—by imposing on me that way, and taking my nickel and giving me a product that I didn't want, if he knew that—get the "If," please, he acted as a crook and to that extent, is crooked.

I never heard of anybody call for "dope" for "Coca-Cola." I am not aware of the fact that "dope" is ever used as a nickname for "Coca-Cola"—it may be though I cannot imagine why it should be used as a nickname, there is no [1462] earthly reason at all why it should be used that I can understand. "Koke" is a sort of alliteration between "Coke" and "Coca-Cola." I can understand why it should be used as a sort of abbreviation. Oh, yes, yes, I have heard of a cocaine fiend,—I have seen them,—and I have heard them referred to as "coke fiends," but I never associated the two terms at all. As I stated a while ago, I never heard the word "dope" applied as a nickname for "Coca-Cola," but "Koke" is the first syllable in the first half of the term "Coca-Cola." It is plain to see why it could be used as an abbreviation. You ask who all I have talked to about this contest between the Koke company and the Coca-Cola Company; why, I talked to President Wilson about it, and Mr. Bryan— You

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caution me that I am swearing and am under oath now; well, I take it for granted, of course, you are joking with me. I had a few words with Gen. Crane in his office just before I was put on the stand here. I believe I had about thirty seconds' conversation with Mr. Edward Crane last evening when I was summoned to appear. I don't remember that I ever talked to him about it; the conversation was of such small consequence I don't remember it. I believe, Gen. Crane, you called me up a month or two ago and asked me if I had a copy of a paper in which the article appeared, and I told you I didn't, and that was the last of that. Outside of that, now, I don't remember a thing. No, sir; I have never talked at any time, either prior to or since, the publication of the particular article which has been put in evidence as an exhibit, and the other article which I will produce and file, with any representative of the Coca-Cola Company with reference to the competition, or the character of the competition, between [1462½] Koke Company and the Coca-Cola Company. I have talked several times with my personal friend, Dan Candler, the local manager of the Coca-Cola Company, about the imposition of "Koke" on the market. No, Mr. Candler did not tell me about all these fraudulent schemes the Koke Company perpetrated on the public. I told him more than he ever told me. I think I can find out a few things that he cannot find out, because that is my business—my business is to find out things, and his is to manufacture. I told Mr. Candler several things, gave him several pieces

of information, just as I would tell you if I thought you were being imposed on and you were my personal friend. It is due of one friend, to another, if I understand friendship. In all the rounds that I have made in attempting to acquire information with respect to the Koke Company and the Coca-Cola Company, I have never run across the word "dope" at all. I have heard "dope" used as a slang phrase for morphine and such as that. You ask if I did not refer to "Koke," in that article I wrote, as a "dope," and if I did not call it a "vile dope," and you ask if that was a gratuitous slander of the beverage on my part; Oh, I probably referred to "Koke" as a dope in the same slangy, playful way that you indicate that "Coca-Cola" is referred to as "dope" in other parts of the country, without any intention of slandering "Koke." I imagine myself going a long way to say awful nice things about "Koke" and the Koke people. I still decline to answer that question you asked about where I found out what concerns were handling "Koke" and those that were not handling "Coca-Cola. (Defendants except to the entire deposition of this witness and move to strike same, unless the witness answers the question propounded to him; overruled; exception.) **[1463]**

Redirect Examination by Mr. CRANE.

I made an error a while ago in stating who first mentioned this matter to me about my testimony in this case. I didn't do my whole duty in answering the question. It was because I inadvertently forgot to tell all of what happened. I believe Gen. Crane

(Deposition of W. D. Smith.)

wrote me a letter and asked me at my first convenience to drop around to his office, and stated that he wanted to see me. I came around and he asked me to tell him if the article was requested by anybody, or if I wrote it of my own volition, and I told him that I did. [**1464**]

Deposition of J. M. Penland, for Plaintiff (In Rebuttal).

J. M. PENLAND.

Direct Examination by Mr. ROGERS.

I am thirty-eight years of age, and am a wholesale druggist located at Waco, Texas; the name of my firm is the Waco Drug Company, of which I am President. I started my career in the drug business in 1894 at Whitewright, Texas, in the retail drug business, from which place I went to Sherman, Texas. I think I went to Sherman about April or May, 1898, and I stayed there one year. While there I worked for W. L. Bitting, as a prescription clerk. Mr. Bitting had a soda-fountain which I, at times, attended. I saw Mr. Bitting at that fountain dispensing "Coca-Cola," and I dispensed it myself. It would be hard for me to say just what names the people used at that time in asking for it—they used "Coca-Cola." "coke" and "dope." At that time if people asked at the soda-fountain for a "coke" I understood they wanted "Coca-Cola."

(Objected to by defendants, because not proper rebuttal evidence. Overruled. Exception.)

In response to request for "coke" I personally

(Deposition of J. M. Penland.)

gave "Coca-Cola" to customers at Bitting's fountain in Sherman, Texas, in 1898 and 1899. I identify the gum label reading as follows: "KOKE, 1 ounce, W. L. Bitting & Co., Druggists, East Side Square, Sherman, Texas," which is filed as Plaintiff's Rebuttal Exhibit No. 79. I have seen such label used at the store of W. L. Bitting, at Sherman, Texas, when I was working for him during the period that I have mentioned. Those labels were applied to a mixture of cocaine and acetanilid crystals that were dispensed to habitual users of cocaine. No, sir, **[1465]** that was not used as a beverage; it was not a liquid at all, it was crystals. We dispensed it in what was known as pill-boxes, and we have a little thin label pasted on the box. I never heard of Mr. Bitting making a beverage, or syrup, and applying the name "Koke" thereto. I had an interview with a man named Moore, representing the Koke Company of Texas,—I think it was in the spring of 1913,—in my office at Waco, Texas. Mr. Moore came into our place and solicited our business, wanting us to act as distributors for the Koke Company of Texas, and made us a price of $1.25 per gallon to any of our trade on direct shipments, or to us for our stock, and he offered as his argument for our handling it, that they were in position to give us this price because they were not doing any advertising, that the average person who called for "Coca-Cola" used the word "coke," and that they would get the benefit of the advertising done by the Coca-Cola Company, and that the retail man could conscientiously justify him-

(Deposition of J. M. Penland.)

self in dispensing "Koke" on such orders or on orders that he thought was intended to be "Koke."

(Objection by defendant and motion to strike on the ground that this is not proper rebuttal testimony and that no foundation was laid for any such evidence in the cross-examination of defendants' witnesses; overruled; exception.)

Yes, sir; something was said by Mr. Moore concerning the resemblance between the product "Koke" that he was offering me, and "Coca-Cola." He said that it was the same as "Coca-Cola." He went further and stated that the man who invented "Coca-Cola" had fallen out with the Coca-Cola Company [1466] and that he was their chemist doing their manufacturing.

(Same objection and motion by defendant. Overruled. Exception.)

Cross-examination by Mr. LITTLETON.

I have owned my drug-store since it was organized in 1911. I have been in the drug business since 1898. I have not owned a drug-store of my own all the time since then. When I quit Mr. Bitting, I bought a retail drug-store at Whitewright, Texas, and was there for about five years engaged in the retail drug business. As I remember, W. L. Bitting didn't make any special preparation outside of "Koke"—I mean by that he made all his tonics and such other things as are usually made in retail drug-stores. He did not, to my knowledge, make anything to dispense at the soda-fountain. At the time I was there Earl Stevens

and Hubert Bitting—a nephew of W. L. Bitting, were working there, also.

I understand the word "dope" to mean anything that is inferior to the genuine article. If a man is manufacturing, say, a high-class kind of goods, and another man is putting out inferior goods at greatly reduced prices, I would say it was dope, class it as dope. Yes, I am acquainted with the fact that there are various drinks on the market similar to "Coca-Cola," I know that there is. Yes, sir, I class those drinks as "dope," most of them. You ask if that is a common designation of those drinks that are similar to "Coca-Cola." No, I don't say that I would,—I don't say that I am familiar with them,—I am not familiar with their method of doing business. I don't know that I would class all of them, because I don't know about [1467] them, but the ones I do know about I would class a dope, yes, sir; according to my meaning of the word.

(Objected to by plaintiff because not warranted by the direct examination. Objection overruled; exception.)

I have considered the word "dope" with reference to drugs and narcotics, and in that respect it means morphine or cocaine, usually, or gum opium, or anything that is used as a narcotic by fiends. To me the "coke" has a similar meaning, because they use it instead of cocaine. I have heard of "coke fiends." The term "coke-fiend" means a coke-fiend in the sense you probably mean—it may mean a fiend who drinks "Coca-Cola." I am not a man who

(Deposition of J. M. Penland.)

drinks a good deal of it, but to me it would mean using cocaine. I don't know that I know how the name "dope" started, or why the public apply the name "dope" to "Coca-Cola." I have never heard that "Coca-Cola" contained any drug of any sort or any narcotic. What I heard was that it contained caffeine. I don't know that I ever heard that it contained cocaine. One of the drinks similar to "Coca-Cola" that I have heard of is "Lemon-Cola," which I have known for two or three years. With the exception of that, and "Koke," and "Coca-Cola," I don't recall any other. I have never handled any of these other cola drinks except "Coca-Cola." I have handled direct shipments of "Koke," and one or two direct shipments of "Lemon-Cola." Mr. Moore, of the Koke Company of Texas, turned in some orders from some of our customers for direct shipments to our account, and those accounts we handled indirectly. I did not agree to handle "Koke" when [1468] Mr. Moore called on me, nor did I agree to take orders for it. I don't think we ever sold over fifteen or twenty gallons of "Lemon-Cola." During the time I was working in the retail drug business, I never dispensed any cola beverage other than "Coca-Cola." No, I don't know the name people use in asking for these other Cola drinks in the establishments where they are sold. I know that they ask for "Coca-Cola" frequently as "dope" or as "coke," but I don't know the nicknames by which the public ask for the other cola drinks. I don't know whether they ask for those other drinks by "coke," "dope,"

(Deposition of J. M. Penland.)

"shot in the arm," and these other names, or not. I have been a regular dealer in handling "Coca-Cola" all the time, and, of course, not having handled or dealt in the other cola drinks, I have not paid any attention to the other people handling the other trade in the other drinks; I have not had any opportunity to observe them. Not having dealt in any other drinks similar to "Coca-Cola," I am, of course, not familiar with the customs and habits of the trade and customers, and the names they use in asking for those other different drinks in soda-fountains. I am not familiar with the preparations to any extent. I don't know of the beverage that W. L. Bitting had, or which was made something similar to "Coca-Cola," but which had rock candy in it, and to which he applied the name "Koke"; if he made any such beverage, I don't know about it. He could not have made any such beverage without my knowing about it. While I was with him I never tried to sell any drink which he had there other than "Coca-Cola," for "Coca-Cola." Yes, sir, I get a rebate at the end of the year on the quantity of "Coca-Cola" I handle. I get twenty-five cents a gallon if I use over 2,000 gallons. Yes, sir; there is a rebate for a less amount. A contract regulating the rebate is made, but the contract is [1469] not necessary in order to obtain the rebate. We make a contract to try to tie the business to us, of course. I buy "Coca-Cola" with the understanding that if I sell so much—two thousand gallons—I will get this rebate. No, sir, we have no contract to the effect that we will not handle

(Deposition of J. M. Penland.)

any of these substitutes. "Lemon-Cola" was cheaper than "Coca-Cola." I don't think we would have made a better profit out of it than on "Coca-Cola." We would have made about the same profit. As I remember it, we would have made about the same profit on "Koke" as on "Coca-Cola," the only advantage being the fact that the goods were invoiced at the minimum price. The drink known as "Dr. Pepper" is still being sold in Waco. I do not know how long it has been on the market, but I have known of it fifteen or eighteen years.

I am not sure that I can tell you who first saw me with reference to my testimony in this case, but I believe it was Mr. McAfee. I don't know in whose behalf he came, but he asked some questions, but didn't take any testimony at all. That was about two years ago, I guess. The next person who saw me was some lawyer, I think, who represented the Coca-Cola Company. He got a statement from me at that time.

(Plaintiff's Rebuttal Exhibits Nos. 79, 80 and 81 were here tendered and offered in evidence.) [1470]

Deposition of W. D. Smith, for Plaintiff (Recalled—in Rebuttal).

W. D. SMITH (Recalled).

Cross-examination (Resumed) by Mr. LITTLETON.

I could not find the other copies of my paper, "The Pitchfork," in which the other articles which I wrote about "Koke" appeared, although I have made diligent search for them. No, I am not convinced from

(Deposition of W. D. Smith.)

that search that they are not in my files. I found more copies missing than I thought were missing; it is possible I overlooked some articles as I went along. I will look for them again, and, if I find them, I will forward them to the Commissioner.

I am still disposed not to answer the questions which I refused to answer when I was on the stand before.

(Defendant's former objection repeated, and motion to strike the entire deposition was again made because the witness refused to answer the questions asked; overruled; excepted.) **[1471]**

(The following deposition was taken by plaintiff as rebuttal testimony at San Antonio, Texas, on June 5th, 1915:)

Deposition of W. J. Garrett, for Plaintiff (In Rebuttal).

W. J. GARRETT.

Direct Examination by Mr. HIRSCH.

I will be sixty-two years old in November; I live in San Antonio, Texas. Yes, sir; at one time I worked for the Gregory Vinegar Company, of Birmingham, Alabama. Now, look here, you are going over a whole lot of questions, and I have already answered every one of them to that other man that came down here to see me. Yes, I once worked for the J. C. Mayfield Manufacturing Company. Now, I know all these questions were put to me by that man, they were answered. Yes, I worked for Celery-Cola Company, too; I was bookkeeper for that company.

(Deposition of W. J. Garrett.)

You ask if, during the time I was working for the J. C. Mayfield Manufacturing Company and the Celery-Cola Company, I ever saw any product around there, or any name around there, whether on the stationery, advertisements, drinks or otherwise, of "K-O-K-E" to the best of my recollection; well, that same question was asked and answered with this other gentleman. Of course, I didn't see anything of that sort; I didn't go down in the mixing-room; whatever things,—the different things he manufactured, or fixed up down there, come out in cases and were shipped to parties, and I was the bookkeeper in the office doing the office work, and I wasn't doing the shipping, as I told you before, and I had nothing to do with it. I was connected with these companies from first to last between four and five years, commencing about 1903, or 1904, I suppose, somewhere along there. No, sir, I never saw "K-O-K-E" on [**1472**] any billheads, or printed in any way, shape, or form, to the best of my recollection,—not that I remember. I don't remember much about that business now, because I have been in other business since that for ten or twelve years, and that has all passed out of my mind; I don't remember it. I don't remember the name, or half the salesmen they had down there; it is a long time past.

Cross-examination by Mr. LITTLETON.

Oh, yes; it is quite possible that he might have made a product "Koke" and sold it as such. They made a good many different things back there, and he was always a great hand to be experimenting all along.

(Deposition of W. J. Garrett.)

I was the bookkeeper and didn't make anything back there, I just handled the books. **[1473]**

(The following deposition was taken by plaintiff as rebuttal testimony at Memphis, Tennessee, on June 7th, 1915.)

Deposition of Mellville Rice, for Plaintiff (In Rebuttal).

MELLVILLE RICE.

Direct Examination by Mr. HIRSCH.

I live at Memphis, Tennessee, where I have been living since June, 1902. I am at present the accountant and assistant Secretary to the Board of Education of the Memphis Public Schools. I am thirty-six years of age. Yes, sir, I once lived at Birmingham, Alabama. I worked for the Celery-Cola Company, in Birmingham, I believe, in the summer of 1904, for about three or four months, as bookkeeper. J. C. Mayfield, Sr., was in charge of that company at that time as General Manager. During the time I was around there, to the best of my recollection and knowledge, I did not see or hear of a product by the name of "Koke," nor did I ever see any advertising or any labels, containing that word, nor did I ever see that word on any stationery around there, or on any of the books, or at any place whatever.

Yes, I was the defendant in the case of The State, vs. Mellville Rice that was tried in Birmingham, Alabama. I remember Mr. J. C. Mayfield, Sr., testifying in that case. I think he was sworn in that case. Attorney Ben M. Allen, of Birmingham rep-

(Deposition of Mellville Rice.)

resented me in that case. Yes, I remember the introduction of a letter in that case signed "Jack" to "Dear Judge." The original letter was introduced in evidence in that case and was present in Court. I heard Mr. Mayfield testify about it, and he admitted writing that letter.

(Objected to by defendants because the transcript [1474] of the testimony is the best evidence of what Mr. Mayfield testified about. Overruled; Exception.)

Yes, sir; he admitted writing that letter. No, sir, I have not got it, I think the letter was introduced by Mrs. Brown, who took possession after it had been read in Court. By introduced, I mean it was handed over to my attorney, that is all. Mrs. Brown didn't testify. She had no connection with the case whatever.

Cross-examination by Mr. LITTLETON.

This Mrs. Brown was Mr. Mayfield's former wife, Mrs. Diva Brown—it was told to me she was. She was present in the courtroom at the time of that trial, and I believe she did supply Judge Allen with the dope for his cross-examination—yes, sir—not all of it, but she gave him some information. She did not pay anything toward his fee in that case. No, sir, I never made a drink called "Caffa-Cola," I made no such thing, I was experimenting somewhat on my own account, with a drink which I intended to call "Caffa-Cola." Oh, yes, I had considerable stationery printed with that name on the heading, and that stationery was found in my room when the officers

(Deposition of Mellville Rice.)

went there—they found everything that was up there. I was bookkeeper there for three or four months, something like that, in 1904, but, after I quit being bookkeeper there, I moved to Memphis and have lived here continuously ever since. I remained in Birmingham until after the trial and then came back to Memphis. My trial occurred there and I was there a week or so after I left the employment of Mayfield—it was not a trial, it was ex parte [1475] evidence on the part of Mayfield. I did not take the stand in that case. No, sir, counsel didn't advise me specially not to take the stand. All I did there for the Celery-Cola Company was just bookkeeper, I posted up the ledger and things of that sort, that was the extent of my occupation.

Redirect Examination by Mr. HIRSCH.

While I worked there I went around the plant. The final disposition of this case of the State against Rice was that the Grand Jury failed to return any indictment as they were asked, and ignored the evidence that Mayfield had submitted, but on this preliminary examination or investigation they bound me over to the Grand Jury.

(The testimony as to the reason for the Grand Jury's action is objected to by defendants because, in the nature of things, it could only be hearsay; overruled; exception.) [1476]

(The following depositions were taken by plaintiff as rebuttal testimony, at Nashville, Tennessee, on June 8th, 1915.)

Deposition of M. J. Handley, for Plaintiff (In Rebuttal).

M. J. HANDLEY.

Direct Examination by Mr. HIRSCH.

I reside at 1211 18th Avenue, Nashville, Tennessee. I have lived in Nashville about fifty-six years. I am in my sixty-fourth year. I was once connected with the Tennessee Carbonating and Supply Company. Really, I don't believe I could tell you about when that was, to save my life. I was so glad to get away from it that I tried to forget it—well, I guess approximately fourteen years, twelve or fourteen years ago. I knew the J. C. Mayfield Manufacturing Company at that time. The Tennessee Carbonating & Supply Company had a contract with the J. C. Mayfield Manufacturing Company for the supplying of their products known as "Celery-Cola" and "Pepsin-Ola"—A ten year contract, as I remember. I was not the President of the Tennessee Carbonating & Supply Company at that time, but I was afterwards. I think I was Vice President at that time, if I remember correctly. The Tennessee Carbonating & Supply Company had a contract with Mayfield that they were to supply them with these two products. I never did know or hear in any way, shape, manner or form of the J. C. Mayfield Manufacturing Company handling, advertising, selling, or disposing of, or dispensing in any way, of "KOKE"—"K-O-K-E."

(Deposition of M. J. Handley.)

Cross-examination by Mr. LITTLETON.

The J. C. Mayfield Manufacturing Company made a number of other things that I did not buy. Now, I want to add [1477] one thing to what I have already said. We handled a product that he made called "Vig-O." But that I don't think was included in the contract and we handled very little of it. I don't know whether or not the J. C. Mayfield Manufacturing Company was as a matter of fact, manufacturing a number of different specialties, I couldn't say. We handled "Celery-Cola," "Pepsin-Ola" and very little "Vig-O." Of course, I don't pretend to say positively that the J. C. Mayfield Manufacturing Company was not manufacturing and selling a product by the name of "KOKE"; I don't know what they were manufacturing; but that is all I knew of. So far as I knew they may have been manufacturing a product called "KOKE"—maybe so. Now, I want to say another thing—when we first began the business it was on Market Street, and J. C. Mayfield had a laboratory in the rear of the building over there. Now, I noticed him ship the stuff out of there, but I never knew what it was—put it up in barrels and shipped it away and I never knew what it was. I couldn't say whether it was "KOKE" or not.

Redirect Examination by Mr. HIRSCH.

I don't think it has been over a year ago when I first heard of this product "KOKE" "K-O-K-E," if it has been that long. [1478]

Deposition of Henry A. Skeggs, for Plaintiff (In Rebuttal).

HENRY A. SKEGGS.

Direct Examination by Mr. HIRSCH.

I reside at 1803 West End, Nashville, Tennessee. I have lived in Nashville thirteen and one half years. I formerly had a place of business in the Stahlman Building in this City, but I am not now conducting it—I have been out since April of this year. The nature of that business was cigars, tobaccos, soda and news, a light caffeteria and lunches. I handled "Coca-Cola" at my soda-fountain. In the five years I was in the fountain business I had one gallon of syrup that was put in my fountain. I don't know whether it was—from the old Nashville Syrup Company, I believe. I wouldn't say positively, but Perkins Baxter, the owner at that time, had been drinking "Coca-Cola" with me and he asked me would I try a gallon of that syrup. I don't know whether it was Fletcher's—it was an imitation of "Coca-Cola," any way; and the salesman came up there and I took a gallon of the syrup which I served him when he called for it, but he didn't drink but a little of it, and the rest of it was thrown away. At no time did I ever sell any syrup for "Coca-Cola," other than "Coca-Cola." With the exception of that one gallon at no time have I ever handled any other syrup similar in appearance to "Coca-Cola," except "Coca-Cola." You ask what drinks we served in response to orders for "coke" and "dope"; I don't know that

(Deposition of Henry A. Skeggs.)

I ever served an order in response to "Coke," but when they call for "dope" I served "Coca-Cola." I understood it to mean "Coca-Cola" because when I called for "dope" myself that is what I expected to get—was a glass of "Coca-Cola." Yes, sir, Mr Brance Darden worked for me at one time. [1479]

Cross-examination by Mr. LITTLETON.

No, sir, I couldn't say that I was at my soda-fountain constantly all the time, but I was there a good portion of the time. No, when I wasn't there I couldn't know what my soda dispensers did when I wasn't there. I know one thing, however, they couldn't buy any stuff and put it in there and sell it without my knowledge and consent. I am not in any business at the present time. I went out of the soda business on account of ill-health—bad physical condition followed by rheumatism. [1480]

Deposition of J. L. Herr, for Plaintiff (In Rebuttal).

J. L. HERR.

Direct Examination by Mr. HIRSCH.

I reside at Louisville, Kentucky, where I have lived all my life. I am twenty-nine years old. I am traveling representing of the Coca-Cola Company at Atlanta, Georgia. I cover Louisville, Evansville and Nashville. I was not in the place of business of Hearvy's during the spring of 1914.

Cross-examination by Mr. LITTLETON.

Well, I couldn't say just where I was in the spring of 1914. [1481]

Deposition of John M. Kenny, for Plaintiff (In Rebuttal).

JOHN M. KENNY.

Direct Examination by Mr. HIRSCH.

I reside in Nashville, Tennessee, where I have lived about thirteen years. My business is bottling "Coca-Cola" in which business I have been engaged for twelve years. I am forty years of age. Yes, sir; I visited the Ball Park in Nashville during the years 1911, 1912, 1913, and 1914. I don't believe I have sold any "Coca-Cola" there since 1912, but we were selling it there in 1912. In the base ball season of 1913 and 1914, out at the Ball Park, I myself have heard calls for "Coca-Cola." In response to such calls "Star-Cola" was served. "Star-Cola" is manufactured by Diehl & Lord, whose plant is on Second Avenue North, Nashville, Tennessee. Yes, sir, I heard Mr. Diehl testify here in Nashville about a month or two months ago. He is the Diehl in the firm of Diehl & Lord.

Cross-examination by Mr. LITTLETON.

Yes, sir; I remember some specific instances where persons who called for "Coca-Cola" were served with "Star-Cola." My wife and myself were sitting in the Ball Park one afternoon in the grandstand, and there were three people sitting right across the way and the boy came by and they asked for three "Coca-Colas." I don't know who those people were. The boy just took the bottles of "Star-Cola," pulled the crowns off of them and handed them to the peo-

(Deposition of John M. Kenny.)

ple, and took the money. I could possibly think up some other instances of the kind, but that is all I remember just at this time. Yes, sir, I saw advertising out there of "Star-Cola." They have got a sign board on the fence down there, Diehl & Lord, yes, sir. **[1482]**

No, sir, they do not advertise out there that they sell "Star-Cola" exclusively at the ball park. I have seen them advertise, though, but what they advertise out there is that the drinks are sold exclusively by Diehl & Lord. Diehl & Lord have never handled any "Coca-Cola" to my knowledge. They don't bottle "Coca-Cola." I am the only person in Nashville that bottles "Coca-Cola," and that fact is well known—I advertise that fact. **[1483]**

Deposition of A. B. Quick, for Plaintiff (In Rebuttal).

A. B. QUICK.

Direct Examination by Mr. HIRSCH.

I am employed at the Regal Shoe Company at Nashville and reside at 1124 State Street. I have been living in Nashville about sixteen years, and am thirty-one years of age. Yes, sir, I visited the place of business of Fried and Haas in Nashville, which used to be at the Transfer Station where they were at the time I called on them. I don't remember the exact date of my visit. I would say it has been about six months ago. Yes, sir, it was somewhere around October, 1914. Mr. Friend went with me. On my first visit to that place I went in and called

(Deposition of A. B. Quick.)

for a "Coca-Cola," I believe, or a "dope," and Mr. Friend went with me and he called for "dope." I called for "Coca-Cola," I think,—I don't remember exactly—but they drew both of them out of the same container, unlabeled. You asked if both of us called for the same drink using the same name, or different names; we used different names. Yes, sir, one of us called for "dope" and one for "Coca-Cola." The syrup used to make both drinks was drawn from the same container. After we made these calls for the drink we bought enough "Coca-Cola" syrup,—at least it was drawn out of the container for "Coca-Cola,"—to make, I think it was—eight or ten glasses of "Coca-Cola." In purchasing that syrup we asked for "Coca-Cola," and it was drawn out of the same container as the drinks served us previously had been drawn from. He wanted to put some water in that syrup, but I wouldn't let him do it. This syrup was put into a thermos bottle and then we went down to the basement of the Duncan Hotel and put it into two eight-ounce bottles. I think I must have put it into two eight-ounce bottles at that time,—I am not positive, one or two eight-ounce bottles, though. After **[1484]** putting it into those bottles, we carried it down to the Savoy Hotel and labeled it and sealed it. That is my signature on Plaintiff's Rebuttal Exhibit No. 82. I put the original of that on the bottle. Mr. Friend was present when I did it. As far as I know, Mr. Friend kept the bottle. After I put the label on there and we sealed it up, turned it over to him and don't

(Deposition of A. B. Quick.)

know what he done with it. No, sir, no change was made, nor anything done with the contents of the bottle from the time I had the dispenser at Fried and Haas to put it in the thermos bottle until after I put it in the one or two eight-ounce bottles. I had my hands on it until it was sealed. There was no change made at all. We went to the place of business of Fried & Haas several times on two or three separate days about the 21st of October, 1914. I called for "Coca-Cola" and Mr. Friend was with me. I would go in first and call for it, and, while I was standing there drinking it, he would come in and order one, and while he was drinking it I would ask for some syrup. I called for either "Coca-Cola" or "dope," I don't remember which one I called for. No, we did not both call for the same thing, we called for different things. I would call for "dope" and he would call for "Coca-Cola"—sometimes he would change it, you know. On the 21st day of October, or thereabouts, the drinks which we called for were taken from the same container every time, whether we called for "dope" or "Coca-Cola." I asked him for some "Coca-Cola" syrup, in fact, I did the asking all the time. We got some syrup on this occasion, also, which I put in a thermos bottle and took down to the Duncan Hotel, and then **[1485]** come to the Savoy and sealed it and labeled it. No change was made in the syrup. Yes, sir, I signed Plaintiff's Rebuttal Exhibit No. 83, that is my signature. Yes, sir, when I got this syrup I took it to the Savoy Hotel and put a label on it, and

(Deposition of A. B. Quick.)

turned it over to Mr. Friend. This is a copy of that label. No change was made in this syrup from the time the dispenser gave it to me to the time I sealed it. I called for "Coca-Cola" syrup on both occasions at the time I got those samples. Yes, sir, I asked the dispenser distinctly for "Coca-Cola."

Cross-examination by Mr. LITTLETON.

Yes, sir, at the time I made these rounds with Mr. Friend I was still in the shoe business; that was done during my lunch hour and of evenings. The way I happened to make these rounds with him is that I just met him, he came to the store,—a friend of mine brought him around there and introduced him to me, and I met him that way, and he asked did I want to go around with him, and I told him, yes. Yes, sir, I knew he was a detective of the Coca-Cola Company, he told me that he was. No, sir; he didn't say he wanted me to go with him to qualify myself as a witness in this case. He said he wanted me to go with him to help him. Yes, sir; he explained to me the nature of his work, and paid me for my services. I think he paid me something like seven or eight dollars for the whole time I helped him. I helped him for five or six days, something like that —five or six nights rather. These samples from Fried & Haas are not the only samples we got; we got samples from several other places. **[1486]** We got them at Warners, got them at Wommacks, and I think those are all the places. We got two samples in each place, making two visits to each place for that purpose. The distance between Warner's and

(Deposition of A. B. Quick.)

Wommack's is about four blocks. We went to one of them one day and another the next. In other words, I got about $1.25 a visit. Yes, when we went into Fried & Haas place I asked for a "dope," and Mr. Friend asked for a "dope" or a "Coca-Cola," I don't remember which, one of us for one or the other, I don't remember which, either "Coca-Cola" or "dope," whatever I asked for, he asked for the other. I don't remember particularly whether at Fried & Haas one of us asked for "coke" and the other asked for "dope." Either "dope" or "Coca-Cola," I don't know whether he asked for "coke" or not. It was either "dope" or "Coca-Cola." I know whatever I asked for, he would ask for the opposite, and they were both drawn out of the same can, no label on it. Yes, sir; "coke" is opposite from "dope" and Friend might have asked for "coke" but I think he asked for "dope." I don't remember exactly the placement of the particular container from which the syrup was drawn on the first visit to Fried & Haas, but it was the same container both times we went there. I don't remember whether it was on the right or left of the carbonator arm, nor do I remember how far from the carbonator arm it was. It was drawn from the same container on each visit we made to Fried & Haas. I think we went there twice the same day. I think we went there one day at dinner-time and one time that same night, or day, or it might have been the next night, I don't remember about that. We made two or three visits there— **[1487]** two visits

(Deposition of A. B. Quick.)

there. I think the name of the dispenser on duty on both occasions was Ragan. Fried & Haas didn't have but one fountain at the Transfer Station. He has two fountains put together, both right there together, I didn't pay any attention as to which one it was we went to. There was one dispenser there, I think, I am not positive. I don't remember now definitely when I got this syrup whether I asked for "dope" or "Coca-Cola." One of them was "dope" or "Coca-Cola." I asked for one and Friend asked for the other. I am positive that when I got the sample of the syrup I asked for "Coca-Cola," not for "dope" or for "some of that same syrup." I know that because that is what I went in for. I went in there for "Coca-Cola." I asked for "dope" or "Coca-Cola" when I called at the fountain, but when I called at the fountain for the syrup to go in the bottle, I asked for "Coca-Cola" syrup. I did that because that is what I wanted. I went there to find out what he served from that spigot. I said I didn't know when I went to the fountain and called for the drink whether I asked for "dope" or "Coca-Cola," but when I asked for the syrup, I asked for "Coca-Cola." I couldn't swear which one asked for "Coca-Cola" and which one asked for "dope," because I don't remember, it has been some time ago. Of course, when I asked for syrup, I asked for "Coca-Cola" syrup and I know that it came out of the same can. Yes, sir, Mr. Friend was present with me during all the time I asked for these drinks. You say that you thought

(Deposition of A. B. Quick.)

I said a moment ago that I would go in and Friend would come in after I had called for the drink; he would come in while I was standing there drinking, then, while he was drinking his drink, I would ask **[1488]** for "Coca-Cola" syrup in his presence, and he would watch the container from which it was drawn, the same as I did. Yes, sir; I used to have a soda-fountain myself at which we sold "Coca-Cola" exclusively. I don't remember now whether that was the only cola drink we handled or not, it has been so long ago,—it has been twelve or fifteen years since I worked in a soda-fountain. I think Wayfield used to make a cola,—something like that, —we used to sell it there. He called it "May-field's-Cola," I think, as well as I remember, I don't remember about his selling anything like "Koke"—K-O-K-E. How did the label begin? Well, I was trying to think. About two or three days ago a fellow was talking to me about that—I know it was "Cola," that Mayfield used to make one. I don't remember what letter the name of his drink began with, whether it was with a "K" or a "C," but we handled the drink some twelve or fourteen years ago. We did not handle any other cola drinks besides that, that I remember, I couldn't say how long he handled that drink. The color of that drink was dark, on the order of cola. I was in the soda-water business at Page & Sims for about four or five years and at the Demovelle Drug Company two or three years.

(Deposition of A. B. Quick.)

(Plaintiff here tendered and offered in evidence Plaintiff's Rebuttal Exhibits Nos. 82 to 89, inclusive. Defendants object to Exhibits 84 to 89 of the above exhibits as irrelevant and immaterial.) **[1489]**

Deposition of Alfred George Weber, for Plaintiff (In Rebuttal).

ALFRED GEORGE WEBER.

Direct Examination by Mr. HIRSCH.

I reside in Nashville, Tennessee, where I have resided since about 1883. I was 35 years of age the last of April. I am not engaged in any business now. I was formerly in the business of selling and dispensing soft drinks. I had a gentleman by the name of Brants Darden working for me when I was in business. I did not ever handle a product by the name of "Koke,"—"K-o-k-e"—that I remember of. I handled "Coca-Cola," pure and unadulterated.

Cross-examination by Mr. LITTLETON.

I was in the soda-water business in the Arcade. I bought that place, I believe, in 1906, and ran it I think about a year, as a cigar-store, and then put in a soda-fountain, which I had up until about 1910. I sold out the business entirely in 1910 to J. C. Matthews and Y. W. Hall. When I ran the business I handled straight "Coca-Cola." At one time there was a Mr. Mayfield who had some "Celery-Cola" there and left it for a short while—I did not handle it but a very little of the time at that—the "Celery-Cola" did not sell of its own accord, and there was not any chance to sell it as "Coca-Cola," so I just

let the stuff go—I did not fool with it. No, I do not think I would have sold it as "Coca-Cola," if I had had the opportunity. Yes, I just stored it at my place of business, you might call it that. "Jimmy" came to town here and he hung around my place a good deal, and he used to get a keg of the stuff in and go out around the town somewhere and sell it. **[1490]** I bought my "Coca-Cola" from Spurlock-Neel Company. I could tell you about how much I bought per year, I think, if I go to Spurlock-Neel. I know the January before I sold out I got a notice of either ninety-one or ninety-two dollars rebate on my Coca-Cola purchases for that year. I am not prepared to say how many gallons that would represent, because it has been some time since I have been posted on Coca-Cola rebates—I think about 750 gallons to $90.00 rebate; I won't say positively, you understand, but that is my recollection that I drew $91.00 or $92.00, somewhere along there—I know it is a pretty good-sized rebate. I never handled anything in the "Coca-Cola" line at my soda-fountain except "Coca-Cola," and that "Celery-Cola" that time Jimmy had it there—I had that "Celery-Cola" separate down there. I only had one dispenser at a time. Now, in regard to this "Celery-Cola," I had "Celery-Cola" advertised on the fountain—Jimmy had some advertising matter, and I had it on the fountain, "Celery-Cola." Brants Darden worked for me shortly before I leased the fountain to Matthews, and then I got Matthews to keep him on, but he did not work very long for

(Deposition of Alfred George Weber.)

Matthews. They had a falling-out and he left them. I think he worked for me in 1910, the same year I sold out. He was the only dispenser I had at that time. I had one dispenser and myself and the negro porter; that is all that ever stayed in that little place. I had several dispensers at different times, but I am speaking about at one time, I just had one man. I do not know what Matthews was handling after I left there. He is in the syrup business now, but at that time he was not making any cola drink, I do not believe. Before I started this soda-fountain I ran a cigar-store, you know. That was just **[1491]** a year before. Prior to that I was on the road selling cigars. I was never in the soda-fountain business before that.

Deposition of Robert F. Jones, for Plaintiff (In Rebuttal).

ROBERT F. JONES.

Direct Examination by Mr. HIRSCH.

I reside six miles out of Nashville on the Franklin Pike. I am employed by the Shurlock-Neel Company, and have been with them ever since they have been in business, which is about thirty years. I am cashier and head bookkeeper of that concern. Yes, I know the firm of Fried & Haas here. I think they are out of business now. Yes, sir; Spurlock-Neel sold Fried & Haas "Coca-Cola." I have the record of the sales Spurlock-Neel made to Fried & Haas during the year 1914, which was 47½ gallons; in 1913 Spurlock-Neel sold Fried & Haas 48 gallons;

(Deposition of Robert F. Jones.)

and I do not know for certain how much was sold in 1915. (Objection by defendants to all this witness' testimony, because secondary evidence, the books being the best evidence. Overruled. Exception.)

Cross-examination by Mr. LITTLETON.

I have no independent recollection, aside from the books, of how much "Coca-Cola" we sold our customers. I do not keep the books myself. I do not actually write out the items which we sell customers. I am the head bookkeeper. I do not make the records myself. (Defendants further object to this witness' testimony, because he knows nothing except from the records of the Company, and he did not make the records, and therefore does not know of his own knowledge that the records are correct. Overruled. Exception.) I do not know whether Spurlock-Neel Company have a regular jobber's contract **[1492]** with the Coca-Cola Company or not. Mr. Martin is the buyer for that department and he can give you the information on that. We do get a rebate, according to contract, or understanding, based on the number of gallons we have sold at the end of the year, and we got a rebate in 1914. Whatever understanding or agreement that was, we bought Coca-Cola under and pursuant to it during the year 1914, and this far during the year 1915. I could not tell you whether we handle any other cola beverage except "Coca-Cola," because I am not a druggist and I do not do the buying. We do not sell any drinks similar to "Coca-Cola," ex-

(Deposition of Robert F. Jones.)

cept "Coca-Cola," that I know of. The fact of the business is, I do not know whether we do or not, but I do not know of any, and I do not believe we do; still, I do not know about that. (By consent defendants withdraw so much of their objection as applies to the production of the books of the company, but stand on the rest of their objection.)

Deposition of J. W. Huggins, for Plaintiff (In Rebuttal).

J. W. HUGGINS.

Direct Examination by Mr. ROGERS.

I am 46 years old and live at Murfreesboro, Tennessee. I am connected both with the Murfreesboro Bottling Works, and with the firm of Christy & Huggins. Christy & Huggins manufacture ice, handle coal, and transfer business; The Murfreesboro Bottling Works manufacture soft drinks. The latter concern has been in business since about 1902. The people who now own it succeeded the Murfreesboro Bottling **[1493]** Works, which was owned by other parties—they bought out the other parties. The business of these other parties was bottling soft drinks. At the time we bought them out we were manufacturers of ice. We took over the soft drink business, that was in 1902 or 1903. We did not buy these parties all out at the same time. We bought them one at a time, consequently it went from 1902 to 1903. We made different trades with each individual. Yes, sir; the Murfreesboro Bottling Works —the one we bought out—and ourselves as succes-

(Deposition of J. W. Huggins.)

sors, bottled soft drinks. We bottled all flavors, such as lemon-sour, strawberry, chocolate. No, sir; we did not bottle "Coca-Cola." We did bottle, however, what we took to be imitations of "Coca-Cola—we were competitors of the "Coca-Cola" people. We tried to reproduce "Coca-Cola"—or did we try to get the right? Yes, we tried to get the right from the "Coca-Cola" people; we were refused, and we tried Mr. Kenny, the Nashville bottler here. We offered him money to buy the right, but somehow or other they would not let us have it. Upon that refusal we decided we had to do something to fight "Coca-Cola," as it rather had the bulge on us in business, and we got us up a word of our own and copyrighted it—a trademark—which was the word "Koke." The word we used was spelled "K-o-k-e." Now, we did try to copyright "C-o-k-e," too. We first started to use the word "Koke" in 1902 or 1903. We selected the word "Koke" because "Coca-Cola" was usually called "coke" by the drinkers—if I wanted a glass or a bottle of "Coca-Cola" I would say, "Give me a 'coke.'" Yes, that was true prior to the time we first adopted and used the word "Koke." **[1494]** Our first use of the word "Koke," before it was copyrighted—we used a diamond-shaped label, spelled it out with plain letters—I would call it a block letter—such letters as that—as the heading of that paper (referring to a copy of the Nashville "Tennesseean." The paper referred to was offered in evidence as Plaintiff's Rebuttal Ex-

(Deposition of J. W. Huggins.)

hibit No. 90.) I could not tell you exactly how long we continued to use the word "Koke" in block letter form, but we probably used it until about 1905. When we went to copyright, or patent this word, we got up a design of our own—I made it myself. I drew it myself with pen and a peculiar kind of ink—I do not know, something that they said they would have to have that would keep. The label heretofore introduced in evidence as Defendants' Exhibit No. 24, reading as follows: "Bottled by authority of Murfreesboro Bottling Works, Murfreesboro, Tennessee," around the periphery, and, in the middle, the word "Koke" in script with two flourishes, is the design I first drew—there is no doubt about it, sir, in my mind. That is undoubtedly the design of the word "Koke" which I, myself, drew. We used that to compete with "Coca-Cola," and we put it on different drinks. We used to buy from H. K. Wampole & Company of Philadelphia, I believe, in syrup form by the barrel, a syrup that they called "Nervola," which we used more than anything else, and then we, ourselves, mixed some syrups that we used this name on. We applied for registration in the Patent Office for the word "Koke," as a trademark. The uncertified Patent Office copy of trademark registration No. 55,848, signed by Murfreesboro Bottling Works, by J. W. Huggins, Secretary, and sworn to by J. W. Huggins, is a copy of the registration **[1495]** to which I refer. (Plaintiff here offered in evidence the copy of the registration iden-

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tified by witness, as Plaintiff's Rebuttal Exhibit No. 91.) Yes, sir, I at one time had negotiations with a man named J. C. Mayfield with respect to the sale of this registration to him, or to one of his companies. Mr. Mayfield came to Murfreesboro to my place of business. Those negotiations resulted in the sale of that trademark to him—that is, the first negotiations—and a sale of a part of the territory that we covered. The Murfreesboro Bottling Works did not sell any "Koke" syrup, we simply bottled it. Ultimately a deal was consummated whereby Christy & Huggins and the Murfreesboro Bottling Works sold to Mr. Mayfield, or his company, this registered trademark "Koke." We only turned over to him the trademark—by that I mean the certificate that we received from the Government. (Objected to by defendants, because an attempt to vary the terms of a written instrument by oral testimony; and, because the written instrument is the best evidence of what was transferred. Overruled. Exception.) No formula was disclosed to Mr. Mayfield, or to the Koke Company of America for making this product "Koke." No business of any sort, and no asset, was turned over either by the Murfreesboro Bottling Works, or by Christy & Huggins Company. (Same objection by defendants. Overruled. Exception.) No list of customers was turned over to Mr. Mayfield, or the Koke Company of America, either by Christy & Huggins or by the Murfreesboro Bottling Works. Neither at the time Mr. Mayfield came to me, nor at

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any other time during the negotiations, nor at any [1496] other time, did he explain to me that he had ever used the word "Koke" as a trademark. He never mentioned such a thing. He never opened his mouth in connection with any use of the word on his part. I personally had the negotiations with Mr. Mayfield, and conversed with him in respect to this matter. Mr. Mayfield did not mention to me that either Christy & Huggins or the Murfreesboro Bottling Works had done any advertising. Mr. Mayfield's testimony in New Orleans that "I explained to them my long usage" (referring to his alleged use of the word "Koke") is not true at all; he never opened his mouth in that connection. I personally had the negotiations with Mr. Mayfield and conversed with him in respect to this matter. Mr. Mayfield's statement; "I knew I could win out in the courts, but I didn't care to do that, they had done some advertising, popularizing my "Koke" and finally I said, 'Let's see if we can get together on a business proposition'" (referring to the Christy & Huggins Company or the Murfreesboro Bottling Works advertising). Nothing of the sort was ever mentioned. The transfer of the "Koke" mark to Mr. Mayfield was made in two trades. The first trade was made without any correspondence, he was on the ground. In the next trade there was some correspondence. I identify the letter addressed to J. W. Huggins, Murfreesboro, Tennessee, dated November 3, 1914, signed "Very truly yours, J. C. Mayfield," which was filed

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as Plaintiff's Rebuttal Exhibit No. 92, and a carbon copy dated November 3d, 1914, which is filed as Plaintiff's Rebuttal Exhibit No. 93. Plaintiff's Rebuttal Exhibit No. 92, is a letter from Mr. Mayfield, writing me in regard to suits brought against his company and asking me if I could meet them in Chattanooga. Plaintiff's Rebuttal Exhibit No. 93, is a carbon copy of my reply to that letter. I am the J. W. Huggins to whom that letter was addressed. (Plaintiff here tendered and offered in evidence Plaintiff's Rebuttal Exhibits Nos. 92 and 93.) I can identify the letter on the letter-head of the Southern Koke Company, Limited, dated December 24, 1913, which is marked Plaintiff's Rebuttal Exhibit No. 95. That is a letter in regard to me sending him the papers. It is a letter written by Mr. Mayfield to Christy & Huggins. (Plaintiff here offered in [1497] evidence the letter referred to as Plaintiff's Rebuttal Exhibit No. 95.) I can identify the letter filed as Plaintiff's Rebuttal Exhibit No. 96. This is the finishing up—in regard to the winding up of the last trade between us, and asking me to send him the trademarks—the papers—the certificate. It is a letter from Mr. Mayfield to Christy & Huggins Company. (Plaintiff here offered in evidence the letter referred to as Plaintiff's Rebuttal Exhibit No. 96.) I can identify the three letters marked Nos. 97 to 100, inclusive. One of these letters is signed "F. G. S. Johnson," that was mailed to me by Mr. Mayfield. Those are genuine letters

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received by Christy & Huggins, or by me in the ordinary course of business. (Plaintiff here tendered and offered in evidence as Plaintiff's Rebuttal Exhibits Nos. 97 to 100, inclusive, the letters referred to.) I can identify the two crowns presented to me with the word "Koke" in script, in the middle, and, around the periphery, "Murfreesboro Bottling Works, Murfreesboro, Tennessee." They are trademarked "Koke." They were used by the Murfreesboro Bottling Company, but we had recently sold most of the interest to Mr. Mayfield. (Plaintiff here tendered and offered in evidence as Plaintiff's Rebuttal Exhibits Nos. 101 and 102, the two crowns referred to.) These particular crowns, or crowns similar to these, were used by the Murfreesboro Bottling Works from about the year 1905 until about 1909. Referring to the label marked Defendants' Exhibit No. 24, I never did see the word "Koke," in the form it there appears in, before I made the design in script of that word as I have testified. [1498]

Cross-examination by Mr. LITTLETON.

I tried to get the bottling rights to bottle "Coca-Cola" in 1902 or 1903. I do not know why I could not get the rights. They simply would not grant it. Yes, I think it was because the territory was covered by Mr. Kenny here at Nashville, and probably he was not willing to release that much of his territory. We finally succeeded in getting the bottling rights, and I am now a "Coca-Cola" bottler and have been

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since 1905. I have been bottling "Coca-Cola" continuously ever since 1905. We never bottled any more "Koke" after we got the contract to sell "Coca-Cola." We got the "Coca-Cola" contract in 1905—No, no, we never got the Coca-Cola contract in 1905, we got it in 1909. In 1905 we got the registration of the trademark "Koke." We did not get any contract in 1905 that I know of in connection with this. From 1902 up until 1909 I was in two businesses, one was Christy & Huggins Company, the other was Murfreesboro Bottling Works, the latter was a corporation. The Murfreesboro Bottling Works, as composed of Christy and the two Huggins, bought the Murfreesboro Bottling Works that already existed in 1902 or 1903—they did not buy all at once, as I explained awhile ago. They bought one party at a time, and continued as the Murfreesboro Bottling Works. Yes, I swore in my application for the registration of the word "Koke" that the trademark "Koke" had been used continuously in our business since about May 1st, 1902, and I think that is about true. I cannot say exactly when we started to try to get the bottling of "Coca-Cola," but right from the very [1499] start of our business we tried to bottle Coca-Cola. The first product we bottled and labeled Koke, was, I think, "Nervola," but we have bottled several different things that we branded koke—several of these different Cola drinks. What we got from the Nervola people was the completed syrup. It looked like Coca-Cola, and

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tasted pretty much like Coca-Cola. We took that product and bottled it and labeled it "Koke." Then we manufactured a syrup that we labeled "Koke," which we made from a formula that we were trying to reproduce Coca-Cola. We bought that formula from somebody, I think, in Florida. I do not remember his name. We made that product ourselves, from the formula that we got. We used an extract of coca leaves. Then we had Wampole to try to make us some syrup by this formula—Wampole of Philadelphia. This syrup that we made we percolated the coca leaves and got the extract out of it. The process which we followed was a very crude one, —we boiled it down just as you would tea in water, you understand, and got the extract, and then we would mix it and store it. We mixed it with several ingredients that we had—I do not know what the ingredients were—I could not repeat the formula, to save my life. I believe I could reproduce it. We would put the leaves in a big kettle, mix it all up and boil it all up together. I do not remember whether we put any alcohol in there or not. I could not say for sure whether we did or not. Yes, sir; we put caffeine in. This product that we made, we only tried that experiment one time, and that was a failure, so that as a matter of fact most of the time we applied our labels to this Wampole [1500] Company's product. This product that we made was just an experiment. We used up what we made, and made no more. Oh, yes, sir; we sold it, I think

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we sold it all. We were competitors of Coca-Cola and we had to fight it, and our idea in putting the label Koke on this Nervola, was to get in between the trade and Coca-Cola—if I wanted a glass of Coca-Cola, or a bottle of Coca-Cola, I would call for a bottle of coke, or a glass of coke. In other words, we just wanted to get this name and sell our product as a substitute for Coca-Cola. You asked why we did not just label it Coca-Cola; well, we had been threatened by these people once or twice on imitations of Coca-Cola; I did not think we had any right to use the word Coca-Cola. No, sir, we had not tried to use the word Coca-Cola before that, but went to them to get the right to bottle Coca-Cola. We expressed in a letter that we were bottling an imitation of Coca-Cola, and we wanted very much to bottle the real thing, and they immediately fired back at us that they had turned our letter over to their attorneys, who would attend to our case promptly. Thereupon we were afraid to take the name of Coca-Cola. We knew we had no right to use it without permission. You ask if I thought we had the right to use the name Koke; why, yes, I did not doubt that. I never did doubt that. I did not think that was anything like the name Coca-Cola in sound or appearance. As I stated before, that was our means of getting Coca-Cola business, and I will say as a rule the majority of people that want Coca-Cola in our section of the country call for [1501] coke. No, sir; I did not want to practice this fraud on the

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public. I did not consider it a fraud. We did not give them Coca-Cola. We really knew they wanted Coca-Cola, I would do it if I wanted Coca-Cola, I would call for coke. You say that we just adopted this name then, for the fraudulent purpose of passing off our product for Coca-Cola; well, I did not think it was a fraudulent purpose. No, sir; I did not want to pass it off for Coca-Cola, I passed it off for Koke, a substitute for Coca-Cola. Probably people did think it was Coca-Cola. You ask if it was my intention to pass it off for Coca-Cola; my intention was, when they called for Koke to give them Koke. You ask if my intention was to pass off on them our product, which we labeled Koke, as Coca-Cola; we used it as a substitute for Coca-Cola. We designed it, and intended it, to get the Coca-Cola trade, the trade of the people who drank Coca-Cola. No, sir; our intention and design was not to have this product of ours served when they asked for Coca-Cola and fool them—not when they asked for Coca-Cola—unless they asked for coke. Yes, I considered a request for coke, practically equivalent to a request for Coca-Cola. Well, I do not know that it is the same thing. You ask if I did not consider that when people asked for coke they were asking for Coca-Cola, and that my product would be substituted for it; that is about the size of it. No, I am not a self-confessed substituter; I do not know whether I can put it exactly that way—when they called for coke, I sold them Koke, believing that they wanted

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Coca-Cola—Yes, I did that myself, when I wanted Coca-Cola, I called for coke. I did not consider that filching or stealing [1502] from the Coca-Cola Company, not a bit. I did not consider that illegitimate at all. I did not see why it was not right. I think my morality in the transaction was all right, sir. If I lost my Coca-Cola contract I would do it again. I have got a perfect right, I own several counties around and have the name patented, and I would not hesitate to. No, I did not actually pass off my drink to the people as "Coca-Cola" and fool them with it. I did not try to do that at all. You say you thought I said that I did try to take advantage of the demand for Coca-Cola; we sold it for Koke, branded it plain "K-o-k-e," every bottle branded "Koke." I do not know whether our customers thought it was Coca-Cola, or not—they ordered "Koke." "XQ. 156. Did you think when you put this brand Koke on the bottle people seeing that brand on there, would think it was Coca-Cola? A. No, I did not think they would think it was Coca-Cola. XQ. 157. Did you think they could not tell the difference between your label—this label, Defendants' Exhibit No. 24,—and the Coca-Cola label? A. The difference is very clear; there is a plain difference between the two, as far as the labels are concerned. XQ. 158. You think anybody could tell the difference between that label and the Coca-Cola label? A. Oh, yes, they are not similar, very much. XQ. 159. You think anybody could tell the differ-

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ence between the word Koke as written on Defendants' Exhibit No. 24, and the word Coca-Cola on the Coca-Cola label? A. I think it could be distinguished easily. XQ. 160. So, then, you put that label on there to distinguish your product from Coca-Cola? A. Well, I put it on as the name of our drink." You ask if I put it on there to distinguish [1503] it from Coca-Cola, or to make people think it was Coca-Cola; no, I did not give that part a thought—I did not care for it to be distinguished from Coca-Cola. I happened to pick up this name "Koke," just as I told you, because people called for coke. I think the majority of Coca-Cola drinkers in our section of the country when they want Coca-Cola would call for coke. I thought I would just call my drink "koke," and, when they wanted Coca-Cola and asked for it by that name—coke—I would just palm my stuff off on them as Coca-Cola—that is practically the size of it. Our drink was as similar to Coca-Cola as we could get it—we came as near reproducing Coca-Cola as we could. We were not selling Coca-Cola, we sold Koke, from 1902 up until 1909. I do not know whether you could put it in that form or not, that we substituted our product for Coca-Cola. We hoped to catch the Coca-Cola trade by the use of the name "koke." Oh, yes, I had heard the name "dope" up to that time. I do not know that I can give you the correct definition of the word "dope," but I take it as meaning something like opium or morphine, something of that kind—that

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would be my idea about it. I do not know that that is correct at all. Yes, sir; we had advertised our product some. Our trade did not cover a great territory. We were not out a great deal on advertising, it was mostly a local business. No, sir; I could not give you any idea about how much advertising we did, but we did advertise it some. We tacked up some posters. We spent very little in advertising the syrup. We advertised the other [1504] drinks that we were making very little; as I said, our business was local, and we were the only bottling works in that town. We did not put this label on any other drink except a cola drink. I could not tell you how long I had heard of this drink "Nervola," before we began buying it. "XQ. 183. What does the word coke ordinarily mean to you? A. Well, now, you mean 'k-o-k-e'? XQ. 184. Well, just the sound of coke? A. Well, it carries with it very much the same meaning that I gave you for dope, to me, to my mind—I do not suppose that word 'koke' has any meaning at all except of our manufacture, but if it has any meaning it is more like a 'coke-fiend,' or a 'dope-fiend,' or something like that." Oh, yes; I have heard of a "coke fiend." Oh, yes, sir, I have heard of a person taking morphine or cocaine—anything like that,—and referring to them as "coke-fiends"; oh, yes, sir. Yes, I have understood that these cola drinks had some kind of drug in it, of that kind, some kind of narcotic. Yes, sir, I have heard it said that they had cocaine

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in them. Yes, sir; the written assignment that we gave to Mr. Mayfield correctly states what we sold him. I think Mr. Mayfield visited our place of business long before this trade was made, or before we even owned the trademark "Koke." I do not remember Mr. Mayfield coming to Murfreesboro about two or three times in reference to this trademark "Koke." He might have talked to some of the others besides myself, but the trading was all done with me. No, sir; I do not know what he told other parties not in my presence. No, sir; I do not know whether he told the **[1505]** other members of this partnership or corporation, or whatever it was, that he had used the trademark "Koke" for years. I think the first visit he made with reference to the trademark "Koke" was about 1912. He first bought the whole of the United States, with the exception of Tennessee, and we exchanged papers on that. Then he came along later and bought Tennessee. He suggested himself that there was no use of registering the first papers at all—just let the papers include the whole thing, except the two or three counties which we reserved. which would wipe out the first transaction. "XQ. 204. Mr. Huggins, did you consider that your trademark "Koke" so nearly resembled the trademark Coca-Cola, as to be likely to cause confusion in trade, or deceive purchasers? A. I did not think there was but very little resemblance in the forming of the two words—in the formation of the two names. XQ. 205. Well, did you think

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there was any resemblance between them in sound, appearance, or suggestion? A. No, sir, not between Coca-Cola and Koke. XQ. 206. You consider them entirely different words? A. I consider them entirely different words. XQ. 207. Not only in the appearance, but in the sound of them? A. Yes, sir. XQ. 208. And in their significance? A. Yes, sir." Yes, sir; at the time we made our application to register this mark Koke we had sold some of the goods to which the mark was applied in interstate commerce. We sold some in Alabama. I have got some papers down in the other room that will show who we sold it to, but I cannot give you the name right now. I do not know how long we had a trade on it outside of the state. We had some drummers selling this soda-water "Koke," as a side-line. No, sir; [1506] we did not sell any in Germany, nor in France, nor in England, nor in any European countries. You asked if I did not swear to this statement, "that said trademark (referring to trademark Koke) is used by said corporation (referring to Murfreesboro Bottling Works) in commerce among the several states of the Union, and particularly between the states of Tennessee, Alabama and Georgia, and between the United States and foreign nations, or Indian tribes, and particularly with England, France and Germany"; I do not know—if that is there and my signature is to it, but we never even tried or thought of such a thing as selling it—we never knew what it would amount to later on, it

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might be valuable in foreign countries later on. No, sir, I do not value my oath lightly, sir. I do not know what is there, but what is there, I did not know that that carried any meaning; if it carried any meaning, I did not know what the meaning was. That paper looks like the real thing. It is Plaintiff's Rebuttal Exhibit No. 91, the record from the Patent Office. We had no trade outside of the United States on that brand of drink. I suppose that was intended for the future, if we wanted to hold rights to that trademark wherever it might be. You call my attention to this language in that oath, "that said trademark is used by said corporation in commerce with Germany"; if we ever had any commerce with Germany, I do not know it, sir. Yes, sir; I have been continuously bottling Coca-Cola since 1909. If we use a certain number of gallons of Coca-Cola a year, we get a rebate. I cannot recall the wording of the contract, but we get a rebate if we use so many gallons of syrup. No, we did not oppose the **[1507]** registration of the word "Koke" as a trademark by Mayfield, that I remember of. We did not have the slightest controversy with him over the name "Koke." The reason why he wanted to buy our trademark was, that he said, "Huggins, you have got the best trademark of all of them," and he says, "You have manufactured your word, that gives you a better title to it than a word that already existed," and he says, "I think I have bought the best one of the whole bunch."

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That was at the time of the first trade we made. In the course of the conversation our trademark Koke came up. I was on a trade with the Pine Bluff people, I believe who were wanting to buy the trademark from us, and I had made them a price on it. So, Mr. Mayfield told me he would like to buy it himself, and from that we exchanged propositions and traded, and that was the time he told us we had the best trademark of all of them, because of the fact we had used a manufactured word. We made the second contract, because Mr. Mayfield wanted them to include Tennessee, in his purchase. We wanted to reserve Tennessee, out of the first contract to protect ourselves from competition. We were bottling Coca-Cola then, we were not using anything that we called Koke then. We hoped not to brand anything with the name Koke any more, but we did not know about that for sure. You call attention to the following language in the letter dated November 3, 1914, addressed to J. C. Mayfield and filed as Plaintiff's Rebuttal Exhibit No. 93: "We do not believe a statement from us on this matter would do your case any good as we are bound to tell exactly why we registered this word Koke. We feel sure that a truthful answer to this question won't help your cause," and you [1508] ask me to explain what I meant by that; I had the idea in my head that if that was brought out, that Koke was used as a substitute for Coca-Cola, or to catch Coca-Cola trade, because of the fact that people called for coke, that wanted

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Coca-Cola, that it would be injurious. However, I consider that perfectly legitimate and honest—when they call for coke. We had plenty of customers that preferred what we were selling to Coca-Cola, and they asked for that as coke. We had just lots of them in our section, where we did business that preferred our stuff to Coca-Cola, and when we quit bottling and branding our goods Koke, they expressed themselves as being sorry and as preferring Koke. We did not get the name Dope and have that registered too, while we were at it because we just preferred the other. I do not know whether H. K. Wampole of Philadelphia is still making Nervola or not. I am under the impression that Mayfield had visited the plant before we began to make Koke because he was in that line of business. He manufactured syrups, etc., and I suppose he had called to sell us syrups. Yes, sir; we bottled some of his syrups. Celery-Cola was the brand we bottled. I do not remember any others. I would not say for sure that we bottled any of his stuff but Celery-Cola, however, we may have. I think the syrup we got from Mayfield came from Birmingham, that was prior to the time we adopted this trademark Koke. When Mayfield came to buy our trademark he did not explain that he was using the word Koke, and that the object he had in buying us out was to get rid of someone else who was using the same trademark as he was. Mr. Mayfield never made any such statement as that to me, or any such claim, [1509]

or even suggested that he ever used the word Koke in any way. It strikes me as being very strange that if he ever used the word Koke prior to 1911 he would buy it and not mention it to me. No, sir; I am not aware of the fact that prior to the time he called on me he had actually registered the word Koke in every state of the Union. He never mentioned it to me. I think if that had been a fact he would have mentioned it—I fell certain he would. No, sir, I do not recall all he said to me on this occasion; I could not repeat his conversation word for word. I cannot tell you exactly how it is that I recall so distinctly that he did not mention this to me, but I know he did not—he was glad to get it,—he was glad to buy it. He never mentioned the fact that the cheapest way to get around it was to buy my rights instead of lawing it. What you suggest was never mentioned at all. No, I have not read over a part of his evidence in this case. Some of the gentlemen here told me what part of it was, and told me that he claimed just what you are talking about now, that he claimed prior use of the word. He said he wanted to buy it because he thought it was the best word that was patented, and he was in the drink business. He said he was going to organize a strong company and push it. You ask if his company was not already organized, as a matter of fact, at that time; I never heard of it if it was—as it now exists, I mean, as the Koke Company of America. I never heard of it, not until after he purchased this. I never heard of it at the time he came to make this

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first trade with me. You ask if, as a matter of fact, that first assignment is not made to the Koke Company of America; **[1510]** no, sir—probably it is, I do not remember whether it was made into a corporation or to J. C. Mayfield. It says the Koke Company of America, but I do not know whether that was an organized institution at that time or not; probably it may have been, I cannot say. My recollection of what occurred at that time is about as clear as it would ordinarily be about a thing that happened then, without any expectation of any trouble coming up or having to repeat it word for word. No, I did not expect at that time that anyone would ask me whether or not Mr. Mayfield had told me at this particular time that he had been using the name Koke prior to the time of this assignment—I never thought of such a thing. There was nothing in the world to impress that upon my mind, not a thing, no, sir. No, sir, I would not be as liable to forget that, if he made that statement, as I was that the assignment was made to the Koke Company of America; that would impress me. I did not believe he had a right to it, I had it copyrighted, and that would impress me, I think. I had the exclusive legal right to it. S. B. Christy and C. B. Huggins are still with me in this bottling company, and they are in Nashville, to-day. I only knew that W. L. Bitting had a trademark registered in the Patent Office, for the word Koke, from correspondence with Mr. Mayfield. He wrote me to that effect, and that was the first I

ever heard of it. That was after I had sold to Mr. Mayfield. The Murfreesboro Bottling Works authorized a concern in Paducah, Kentucky to use the name Koke on a product it was bottling, but the license was strictly confined to Paducah so long as it did not interfere with us, and was to be discontinued at any time we saw fit. We did not supply them with **[1511]** labels. I do not know what they used, at all. There was a Pine Bluff concern that frequently wrote me about using the word, and was trying to buy it from me, along about the time Mr. Mayfield bought the trademark, I told him they had been using it and were trying to buy it. I have forgotten exactly what I had to say to them in regard to it, but I was on a trade with them to sell it to them when Mr. Mayfield bought the first time, and I had a proposition out to them at the very time Mr. Mayfield bought, and countermanded that proposition by telegram. No, Defendant's Exhibit No. 24, is not the only label we used, but that is the only label to paste on a bottle that we used after we had the thing copyrighted. You ask why we had our Koke crowns —those marked Plaintiff's Exhibits Nos. 101 and 102, printed in that color and on that silver background; why just showy, I suppose is why. We had other crowns like that, red on a silver background with a red circle around them, I think,—I won't be sure about that. They come in such a variety it is hard to answer. "XQ. 357. Do you think anybody would mistake that crown for a Coca-Cola crown?

(Deposition of J. W. Huggins.)

A. Not the reading of the crown. XQ. 348. Well, do you think the general appearance of the crown, anybody would mistake it? A. The only resemblance between that and the Coca-Cola crown is a little flourish on the letter. XQ. 359. And you think anybody could tell that right off? A. I think they could." (Plaintiff here tendered and offered in evidence the assignment dated November 28th, 1911, as Plaintiff's Rebuttal Exhibit No. 103.) [1512]

Deposition of S. B. Christy, for Plaintiff (In Rebuttal).

S. B. CHRISTY.

Direct Examination by Mr. ROGERS.

I am 46 years old, and live at Murfreesboro, Tenn. I am in the coal, ice, transfer and bottling business. I have been in that bottling business about thirteen years. Yes, I was connected with the Murfreesboro Bottling Works in 1902. That is the corporation that registered as a trademark the word Koke in the Patent Office. The application was filed April 10, 1905. The reason why we adopted the name Koke was because we were putting out a cola drink in competition with Coca-Cola,—we could not get the right to bottle Coca-Cola, so we decided on the word "Koke," as Coca-Cola was called coke a good deal. Coca-Cola was called coke by the public at Murfreesboro prior to the time we adopted the word Koke. Yes, I have called for Coca-Cola as coke, prior to June 1st, 1902. Yes, I was present at the interviews

(Deposition of S. B. Christy.)

with Mr. J. C. Mayfield, in 1911, and thereafter, concerning the negotiations for the purchase of the registration of the word Koke by Mayfield, or the Koke Company of America, from the Murfreesboro Bottling Works. J. W. Huggins was also present. C. B. Huggins was also connected with the Murfreesboro Bottling Works at that time, but he was not present at any of those interviews that I remember. No, sir, I did not hear the conversations—not all of it—I was just called there. No, I did not hear Mr. Mayfield, in speaking in regard to the word Koke, say what follows, or anything resembling it, "I explained to them my long usage, I knew I could win out in the courts, but I did not care to do that, they had done [1513] some advertising, popularizing my Koke, and finally I said, 'let's see if we cannot get together on a business proposition.' "

Cross-examination by Mr. LITTLETON.

I remember that a statement of that kind was not made. I would remember a question like that. You asked when was the first time I thought about that statement since the transaction occurred; to-day is the first time I ever heard it read. I heard it read one time before to-day. No, sir, nobody has ever questioned me about that before to-day. This is the first time that I have thought about it since 1911. To-day is the first time I was ever questioned about it or thought about it. No, sir, I do not remember all the conversations that took place, I cannot say that I do. We put the name Koke to any syrup we might buy and put up as a cola drink. We applied it in-

(Deposition of S. B. Christy.)

discriminately to any cola drink we would bottle. We bottled, as a matter of fact, anything we could buy, buying first at one place and then another. We tried to make it ourselves, but we made a failure of it. That was after we had been buying it from other people. We bought from Wampole and from Mayfield, and probably bought some from Hutchenson at Chicago—just any one that came along advertising an imitation of Coca-Cola, why we would take a chance on it, trying to get something as good as Coca-Cola. We applied this label to the drinks mentioned. We applied it to the drink we bought from Wampole. I do not remember about the Mayfield drink, because that was in the first year that we were putting up Celery-Cola. The name of the concern [1514] we bought from in Chicago, was, I think, W. H. Hutchinson & Son. These were extracts we bought, but Wampoles was not, it was in extract form. We had to add simple syrup to them. The label shown me, marked Defendants' Exhibit No. 24, is the label with which we labeled these drinks, when we put them out. That is the label we used while we were bottling these various products. We did not use it all the time; no, sir. We used that label after, probably some time in 1904. We had that label and used it, but we could not get it registered until 1905. We used it before we registered it. No, sir, we did not adopt this label after we had registered our trademark, that was before, I would not be able to tell you when we began to use the crown marked Plaintiff's Rebuttal Exhibit No. 101,—prob-

(Deposition of S. B. Christy.)

ably 1905. I suppose we adopted that kind of crown, just to make it as near like Coca-Cola as we could. At that time most everybody was trying to get an imitation of Coca-Cola, and a good many of them had crowns like this one, I mean red on a silver background, I suppose, crowns like that—the red letters on the silver background with a red ring around them were in general use at that time. There was no objection to our using them at that time. Yes, sir, I was one of the members of this concern when they adopted the name Koke. You ask if I wish the Court to understand that we deliberately adopted the name Koke in order to pirate upon the reputation and demand for Coca-Cola; I do not know what you call it, but that is what we did. I have told you what we did. You ask if that is my general character, if I am the kind of a person to do that kind of a thing; well, I suppose you could find out **[1515]** in my home town. We considered that a perfectly honest and legitimate business, sir, yes, sir. We did not put the name Coca-Cola on the bottle, because we had no right to. "XQ. 70. Did you think you had a right to put this name Koke on there? A. The Government thought so. XQ. 71. Didn't you know this name Koke, anybody looking at it would right off think it was Coca-Cola? A. No, sir. XQ. 72. Did not you know when they heard it spoken, they thought it was Coca-Cola? A. Well, I do not know about that. XQ. 73. Did not you know that the appearance of that word Koke, as it is written on that label, marked Defendants' Exhibit No. 24, looks so

(Deposition of S. B. Christy.)

much like Coca-Cola that you cannot tell the difference? A. No. XQ. 74. You mean to say it looks different from Coca-Cola? A. Yes. XQ. 75. You mean to say that anybody can tell the difference right off? A. Anybody that could read, they could. XQ. 76. But, as a matter of fact, however, it sounds just like the four sylabled name 'Co-ca-Co-la' don't it? A. No. XQ. 77. You think anybody could tell the difference in sound between the word Koke and the word Coca-Cola? A. Yes." Coke is a nickname for Coca-Cola. If I went into a fountain and asked for a coke, I would want a Coca-Cola. I could not tell you when I first heard the word coke. At one time we made up the drink we started to make with coca leaves, yes, sir. I can hardly answer what idea the words Coca-Cola convey to my mind, other than that I would want a Coca-Cola. If I heard a drink called lemon-orange, that name would convey to me the idea of a drink made from the essence of lemon and orange. "XQ. 88. Well, what idea does this word Coca-Cola convey to your mind? A. Made from coca leaves and cola nuts, I reckon. XQ. 89. Well, **[1516]** what idea does the word 'Koke' convey to your mind, 'K-o-k-e'? A. Nothing at all." It is just a nickname, is all I can say. Yes, sir, I have heard of a person who used cocaine, I have heard them referred to as a dope fiend, and I have also heard them called cocaine fiends. I never heard them called coke fiends. I do not know the name of that drink we put up, which we got from Chicago. It was some cola extract—there are so many of them,

(Deposition of S. B. Christy.)

I cannot remember. I cannot say that our customers thought when they bought our Koke that they were buying Coca-Cola. No, we did not intend for them to think that, because they knew we had no license to put up Coca-Cola. They knew that because Coca-Cola was selling there in competition to us, and if they wanted Coca-Cola, they would have to buy it from the Coca-Cola Company. No, sir, I do not know that when people went into the stores and stands where our customers were selling our drink and asked for a coke that they wanted Coca-Cola. No, I do not know that everybody who uses the word coke when he goes up to get a soft drink of this kind wants Coca-Cola. I cannot say whether or not after we adopted this word koke, and put out stuff under that name, that they always wanted Coca-Cola—when they asked for it under the name coke they were supposed to be wanting Koke, because we were bottling it there at our town and we were advertising it and selling it. We were selling that on its own merits then, and not pirating on the merits and demand for Coca-Cola. You ask why we went and adopted this nickname for Coca-Cola, if you wanted to sell it on its own merits; we had to have some name for it and that was the best name we could get. I do not know why it was the [1517] best name. "XQ. 114. Don't you know, Mr. Christy, that you adopted that name Koke for the sole and only purpose of enabling you to substitute your beverage for Coca-Cola and pass it off to the public and fool them and make them think it was Coca-Cola? No, we did

(Deposition of S. B. Christy.)

not try to fool them that it was Coca-Cola, because they knew it was not Coca-Cola. XQ. 115. How did they know it was not Coca-Cola? A. We advertised it as Koke." You ask if I think the name Koke sufficiently distinguished it from Coca-Cola to enable them to now it was not Coca-Cola; well, I do not know. Yes, sir, I do think that after we had been in business there for several years selling our product and advertising it as Koke, that our customers thereafter knew the difference between Coca-Cola and Koke, and asked for Koke and wanted it. From 1902 to 1909 we bottled Koke and sold it in competition to Coca-Cola. No, sir, we did not sell it as and for Coca-Cola. No, sir, we did not fool the people with and make them think it was Coca-Cola. I do not know, I guess when people asked for coke they did want Coca-Cola. We sold it to the merchants, we did not sell it to the people. Yes, we were putting it in the hands of our dealers. No, we did not tell our dealers that they could sell it when people asked for coke. We sold it in competition to Coca-Cola. You ask if I do not know when I picked up this nickname for Coca-Cola and put it on there, —K-O-K-E—if I did not know that I did that for the deliberate purpose of enabling my dealers to substitute that and palm it off to the people who asked for and wanted Coca-Cola; no, I cannot [1518] say that I did. No, I cannot say that we adopted the name Koke in order to distinguish our goods from Coca-Cola. It was a cola name, just the same as other names that had been registered, and we just

(Deposition of S. B. Christy.)

thought it was one of the best names along the line of dope and coke, and all other colas that they had been registering. I understood that the word dope had been tried to be registered at one time. In 1902 they called it by the name coke. Yes, sir, they called our drink coke in 1902. All of us at the factory called it coke, and the men that worked at the factory and the people in general—our customers. The fact of the business is, they call all of these drinks coke at times. These cola drinks are generally known as cokes and dopes.

Redirect Examination by Mr. ROGERS.

The commercial product which the word Coca-Cola conveys to my mind is a soft drink made by the Coca-Cola Company of Atlanta. The syrup which I said I bought from Mayfield at one time, was sold by me under the name of Celery-Cola, and was labeled Celery-Cola. You ask what other drink besides Coca-Cola had I ever heard nicknamed coke before June 1st, 1902; I never heard of one. When I, myself, prior to 1902, went to a soft-drink stand and asked for a coke, I had in mind and expected to get, "Coca-Cola." **[1519]**

(The following depositions were taken by plaintiff as its rebuttal testimony on June 9, 1915, at St. Louis, Missouri.)

Deposition of Norville N. Leaver, for Plaintiff (In Rebuttal).

NORVILLE N. LEAVER.

Direct Examination by Mr. HIRSCH.

I reside at 2438 Washington Avenue, St. Louis. I have lived in this city fifteen years, and am thirty-seven years of age. I was employed by the J. C. Mayfield Manufacturing Company at St. Louis from June, 1903, until about the 15th of February, 1904, as city salesman here in St. Louis. When I was first employed, the place of business of the J. C. Mayfield Manufacturing Company was located on 18th and Olive Streets, formerly the Harmony Hall,—known as the Harmony Hall Building. I manufactured the syrup at the time I was with them. No, sir, when I worked for them the J. C. Mayfield Manufacturing Company did not ever manufacture, make, sell or advertise, or have anything of any kind or character with the name "KOKE" on it. You ask if I ever worked for the Celery-Cola Company of Missouri here; well, I worked for the party who succeeded the J. C. Mayfield Manufacturing Company, and who did business under the same name, only they put on "Celery-Cola." They never had any product, or any stationery, or anything like that, with the word "KOKE" on it that I know of,—not while I was employed with them. I never sold it myself. I was around the place of business of the Mayfield Manufacturing Company from seven o'clock in the morning until seven at night, except

(Deposition of Norville N. Leaver.)

when I was out on the wagon. No, sir, I never did see "KOKE" around there. The only real product they were selling was "Celery-Cola." [1520] They were also selling a product called "Pepo-Ade," or some name similar, the name sounds like that. I saw the label filed as Plaintiff's Rebuttal Exhibit No. 104 used here by the J. C. Mayfield Manufacturing Company. It was made in solid red at one time, and yellow and red and black filling.

(Plaintiff here tendered and offered in evidence the label referred to as Plaintiff's Rebuttal Exhibit No. 104.)

Cross-examination by Mr. LITTLETON.

I am a manufacturer of soft drinks and have a saloon and cafe. I put out a drink known as "Orin-Cola." That is a drink something similar to "Coca-Cola," merely flavored with various ingredients, you understand. It looks like "Coca-Cola." It is colored the same as "Coca-Cola." I put it out in bottles only; it is not sold at soda-fountains. I have been making this drink since March 1st, 1904. I got the formula for making this drink from my partner. I formerly had a partner who made syrup for the J. C. Mayfield Manufacturing Company, and I went in business with him. My drink is not now made by the same formula, I have changed it considerably. I never had the drink while my partner was working for Mr. Mayfield. My partner made this formula when I went into business with him. He gave me the formula. He acquired the knowledge of that formula while he was working for the May-

(Deposition of Norville N. Leaver.)

field Manufacturing Company. He is the only one that did know it. I colored my drink the color of "Coca-Cola," for the simple reason that it is customary among the trade to demand black soda, or dark soda,—sarsaparilla of various descriptions. I don't know why I color **[1521]** this particular drink the color it is, except it is the custom from experience, when people ask for lemon-soda you have to have a white soda, and if they ask for sarsaparilla it is black; if they ask for "Dr. Pepper" it is black; and we color them for that simple reason, I suppose. I give it the flavor it has because people like a flavor of that kind. I never substitute my drink for "Coca-Cola." I make it the same color as "Coca-Cola." It does not taste like "Coca-Cola." It will not taste similar. You take the two together and you can tell the difference. There is no resemblance in taste. It is along the same general lines, however. I put my drink in white bottles, clear glass, seven-ounce bottles. You ask how the size, color and general design of my bottles compare with the "Coca-Cola" bottle; some "Coca-Cola" has blue glass bottles, green glass rather, and it is a little bit smaller on the top than mine. You ask if mine is the regular circular soda-water bottle. There are two or three different sizes. In my experience there is half a dozen styles on the market in the City of St. Louis. I will produce a bottle of my "Orin-Cola" and file it as Defendant's Exhibit No. 5 to my testimony. I was the outside salesman in the city when working for the J. C. Mayfield Manufacturing Company in

1903 and 1904. I visited throughout the city. The only occupation I followed was city salesman, that is all. I was a driver and delivered the goods, solicited trade, sold, collected money, and brought it in, etc. If I am not mistaken the J. C. Mayfield Manufacturing Company furnished syrup,—Mayfield made the syrup. I worked for that company somewhere around the 15th of February, 1913, and I stayed there until they discharged me. [1522] I think fifteen days after that we went into business ourselves. It was not 1913—it was 1914. During the period between 1904 and 1914 I had no connection with them whatever—Yes, sir, I was taken back. They came to the plant after the Liquid Carbonic Company took their machinery and bottled goods. I am not now connected with the Liquid Carbonic Company, and never was. I never did work for them. I said they came to bottle their goods after the Liquid Carbonic Company had taken their machinery away from them. I am not talking about the drink they manufactured. The party who formerly owned that company was a Mrs. Brooks. She had bought it off from the J. C. Mayfield Manufacturing Company,—that was 1905. The product was "Celery-Cola." I was driving for her about—I don't know how long, I don't know what time she came in, but I stayed there until the weather got cold in February, and then she let me out. Of course, after that time I do not know anything about what other product she was making. All I know is that time Mrs. Brooks sold "Celery-Cola" and extract

(Deposition of Norville N. Leaver.)

syrup. The second business was located at 2224 Washington Avenue. The third place of business was sold out to a party named Knost. That was the latter part of 1905, I believe, or 1906, I cannot be positive. The only thing I know is that he had the output, and a friend of mine took the wagon after I left and he was driving for them and he told me. I remember all the different kinds of labels he used. He only used "Pepo-Ade" and "Celery-Cola." The only thing I can remember is this "Celery-Cola." I remember "Pepo-Ade," but he did not handle that so much, I handled it, but did not handle it so strong. The only way I could describe the labels is "Celery-Cola," [1523] only white, a capital "C," and kind of scroll work. They printed some of the labels white and some red. One time they had a red and a blue; another time they had a solid red, and another time they had red with blue and a yellow and black background. That is the only kind I remember of. I said that back in 1903 and 1904 I was city salesman, and was out in town going around to the trade. I worked as long as I wished to; I went to work when I got ready and quit when I got ready. I was in the factory twice a day after more goods, I would take the goods as fast as possible. They did not have bottles enough to supply the trade, and I would bring in bottles. I was acquainted with everything they put out. They mixed their syrup on the second floor. Yes, sir, I was just a salesman connected with the bottling department, I delivered syrup in gallon jars around the city. Of course, I did not

(Deposition of Norville N. Leaver.)

know anything about the business upstairs. I did not go up there. I did not know what they were doing up there. I do not know what products they were making upstairs. You say they may have been making a drink called "KOKE" upstairs for all I know; not that I know of. When I went into business Mr. Bohne has been associated with me for the last ten years and he told me everything—taught me how to make the formula,— and he never mentioned anything about the matter. I did not say that I did not learn the formula of him. I said the formula, when I started in business, was given to me, and he made this formula. I am referring to Mr. Bohne. He was the chemist for the Celery-Cola Company. All I know about the different things that were made upstairs is just hearsay. **[1524]** I cannot swear what was done upstairs.

Redirect Examination by Mr. HIRSCH.

Yes, sir; this work I said I was doing I also did for the J. C. Mayfield Manufacturing Company, I worked for them, also.

(Plaintiff here tendered and offered in evidence an exemplified copy of the petition and answer in the case of J. C. Mayfield Manufacturing Company against the Celery-Cola Company, in the Circuit Court of the city of St. Louis, Missouri, October Term, 1915, together with photographs of two labels which appear in the original petition as Plaintiff's Rebuttal Exhibit No. 105.) **[1525]**

Deposition of John H. Bohne, for Plaintiff (In Rebuttal).

JOHN H. BOHNE.

Direct Examination by Mr. HIRSCH.

I reside at 4570 West Pine Street, St. Louis, Missouri. I have lived in St. Louis almost all my life. I worked for the J. C. Mayfield Manufacturing Company of St. Louis, in 1903, and up to March, 1904, as a chemist. As such, I manufactured all of the products that they put out, such as "Celery-Cola," fruits, and syrups and crushed goods, such as they had in that business at the time I went with them. If the J. C. Mayfield Manufacturing Company made, handled, advertised, or had anything of any kind or character around that place, with the name of "Koke" on it, I never did hear of it. No product with "Koke" on it, was sold while I was there. I never heard of any product that had the word "Koke" on it, not during my stay there. There was no literature, or any papers of any kind that had the word "Koke" on it.

Cross-examination by MARION C. EARLY, Esq.

I was employed there about a year. We originally were in the old Library Building at 18th and Olive Streets, where Butler Brothers' Building is now, and Mr. Mayfield sold out his interest to a man named Sykes, and, when Sykes got hold of it, I was made Manager of it. He moved the plant from there up to 23-hundred and something, Washington Avenue. I stayed right with the company after Sykes had con-

trol. Mr. Sykes kept a man by the name of McNish, of Nashville, as bookkeeper,—I don't know his initials, nor do I remember the initials of Sykes. I remained with the Mayfield people, I guess, about six months after Sykes let him out. I am pretty sure that the time I commenced my employment with Mayfield **[1526]** was April, 1903. At that time Mayfield's place of business was on Olive Street, near 18th. He occupied the whole building. I do not remember the number of it. It was a four-story building. They had a laboratory on the top floor. There were about twelve or fourteen people employed by Mayfield at that time. They did not keep anything on any of the floors, or two of them, they had a laboratory on the fourth floor, and on the second floor they had the syrup tank and kept syrup; on the first floor they had the bottling plant and the office, and in the front we had a public soda-fountain. On the other floors there was really nothing. I did not attend the soda-fountain. Mr. Brooks attended to that while he was there, and eventually they took hold of the plant. Mrs. Brooks and Mr. Sykes,—in fact, Mr. Mayfield took it back from Sykes and sold it to Mr. Brooks. Sykes operated it about four or five months. When Sykes got hold of it we made an arrangement with the Brooks people to buy the soda-fountain floor bodily,—that is, we sold "Celery-Cola,"—that is all we sold at that time. By the 'Brooks people," I mean Horace Brooks and his mother. They came here from Nashville or Memphis. Under Sykes I was the manager of the plant.

(Deposition of John H. Bohne.)

As such, I checked up the drivers every day, took their receipts every evening, and kept a record of the bottled goods, and manufactured all the goods we needed in the line of syrups, and bottled it up. I sold nothing of that kind except "Celery-Cola." While I was with Mayfield, he sold three beverages, namely, "Celery-Cola," "Pepso-Ade" and "Lager-Ale," The last was in extract form. I got up the formula myself. I was with Mayfield altogether about six months, and then he sold out to Sykes. I was then with Sykes about four months, and then [1527] Mayfield got it back again, and, as soon as he got the plant back in his hands, we made arrangements with the Brooks,—Mayfield turned it over to the Brooks. They took over the plant and bought the syrup,—bought the extract which Mayfield shipped up here from Nashville. I held the position of chemist when with Mayfield, and manufactured all of the syrup. I did not do all of the work myself; when we were putting up the fruit two girls helped me. I am a chemist, having studied chemistry at St. Louis College of Pharmacy, which I attended three years. As a chemist, I did all of the compounding for Mayfield. He was not up here; I think he was in Nashville. I do not know just where the flavor came from that he used in his "Celery-Cola," that was the only part that I did not manufacture,—but I added that according to his instructions. What the formula called for, I did not analyze that. We had it sent up here in five and ten-gallon kegs, and we added that to the "Celery-Cola," the flavor. The appearance

of this "Celery-Cola" that he made was a dark brown, almost like sarsaparilla. The "Lager-Ale" looked like beer after it was bottled. It was red in appearance in the extract form, but it was diluted down. The appearance of the other beverage was also brown. The "Celery-Cola" and "Pepo-Ade" that we put up was put in eight-ounce soda-bottles. During the six months I was there, I do not know of any such beverage being sent out to any place as "Koke." Mr. Mayfield was not there very much; he was between here and Nashville most of the time. He came here maybe every week, and maybe only a few days, and then he would go back there. Mr. Britton was manager for a short time. I could not say that I saw everything that [1528] was sent out from that plant. I could not possibly see everything that was sent out. I do not think that Mr. Mayfield spent as much as half of his time here in St. Louis. I do not know where the labels were printed; I do not recall whether they were printed here or somewhere else. I did not have anything to do with this kind of label. The labels for the fruits and syrups I had printed here by the Cloyton Printing Company, myself. Mr. Mayfield turned the formulas over to me, with the exception of the formula for the flavor. When I left there he got them back again, I guess. I never took anything out of the place. He never give me the original formula, simply gave me copies of what he had. I did not myself make use of any of Mr. Mayfield's formulas outside of the line of my employment. While I was with him I made use of his

(Deposition of John H. Bohne.)

formulas, but after I left him I did not use his formulas. I did not use his formulas in any other connection, nor did I give them to anyone else. I am employed now by the Liquid Carbonic Company, whose business is soda-fountain supplies. They are large purchasers and jobbers of "Coca-Cola," and have been since long before I went with them. Yes, sir, I know Mr. Norvell N. Leaver. After I left Mayfield I went in partnership with him in 1904, in the manufacture and sale of a drink called "Orin-Cola." We originated that drink ourselves. We had the trademark registered in the State of Missouri, but nowhere else. We did not think it was necessary to register the trademark anywhere else, because the business was not worth that much. We were simply figuring on doing a local business and making a living. The color of "Orin-Cola" [1529] was a brown color like the usual cola drinks. Most all of the cola drinks I ever saw are about the same color. I never saw any difference in them, so far as the color is concerned. Burnt sugar produces that color. By cola drinks I mean drinks that would be called by the name of some cola, "Coca-Cola" or "Aqua Cola," or anything of that kind of cola drinks. No, not anything that has that particular color,—it does not refer to color, it refers to the ingredients. My understanding of the thing is that any drink that would be called under the name of cola usually has the same color. The beverage which my partner, Mr. Leaver, and I manufactered had cola in it. I guess Mr. Leaver now has that formula. I sold out to him after about five

(Deposition of John H. Bohne.)

months. We created a demand for our drink under the name of "Orin-Cola." I place that beverage in the class which I designate as cola drinks. It was known as "dope," also. If I called a drink "Lemon-Orange," I would think its principal ingredients would be a combination of lemon and orange. If I heard it called "Orange-Cola," I think it would contain those things,—orange and cola. If I heard a drink called "Coca-Cola," I would think it contained coca and cola.

Redirect Examination by Mr. ROGERS.

I think the cola product called "Coca-Cola" would be "Coca-Cola."

"Q. Manufactured by whom?"

"A. Manufactured by the Coca-Cola Company, and advertised as such." **[1530]**

(The following depositions were taken by plaintiff as its rebuttal testimony at Chicago, Illinois, on June 10th, 1915:)

Deposition of Herbert G. Warvell, for Plaintiff (In Rebuttal).

HERBERT G. WARVELL.

Direct Examination by Mr. ROGERS.

At present I am in the mail order business with Neese, Strassburger & Warvell, 164 West Washington Street, Chicago. I was a resident of Chicago during the month of April, 1913, at which time I was a detective in the employment of the Pinkerton National Detective Agency, making an investigation for

(Deposition of Herbert G. Warvell.)

the Coca-Cola Company. You ask if I recall, on April 24th, 1913, standing on Munroe Street and observing J. W. Mayfield in conversation with some one; yes, sir; I have some notes here. Those notes were made on the night of April 24th, 1913, by me, and I have them here with me now. (Referring to notes.) While standing on Munroe Street talking, Mayfield says: "Frequently at the Home Drug Company the two drinks get mixed, Koke gets in the 'Coca-Cola' urn, and *vice versa*, but, as no one can tell the difference, no harm is done." Mr. Boyd and myself were there at the time, but I don't remember whether Mr. Mansfield was there or not. The Mr. Boyd I refer to is E. M. Boyd, of Dallas, Texas. He was here in Chicago at that time endeavoring to sell the stock of this Koke Company.

Cross-examination by Mr. LITTLETON.

I had done some work for the Pinkerton Detective Company in the early part of 1913, but my permanent employment did not begin with them until I think about the latter part of March or the 1st of April. I had never done any detective work **[1531]** previous to 1913. Prior to that I was in the railroad business in the capacity of train dispatcher. I was employed as a Pinkerton detective in the interest of the Coca-Cola Company for about two months, from about the 1st of April, to the 1st of June, 1913. I was instructed to ascertain as much as possible about this Koke Company. I cannot say whether J. W. Mayfield was in Chicago during all the time I was working for the Coca-Cola Company, because I

(Deposition of Herbert G. Warvell.)

did not have Mr. Mayfield under surveilance all the time. My duties were to go around with Mr. Boyd and hobnob with him, follow him, and keep him under surveillance and find out all I could from him pertaining to the "Coca-Cola" case. I cannot say how many other detectives the Pinkerton Agency had employed on this case at that time. I cannot say how many they had working with me. At one time or another there were one or two men working. One was H. A. Scholz, another was Maurice Wolfe. I don't know what Wolfe's instructions were, but I think most of his duties consisted of keeping this young Mayfield under surveilance. I did not keep Mr. Boyd under surveillance during the entire time he was here in Chicago. He was stopping at the Palmer House, you know, and sometimes—say it would be nine-thirty or ten o'clock or ten-thirty, maybe later,—he would say, "I guess I will go to bed, and then I would go, but during the daytime, I don't hardly think there was a day but what we were together. There might have been one or two, I cannot say now, for sure. The excuse I gave for my presence with him was a pretense that I was a probable investor in his company; I told him probably I would want to [1532] buy stock in it. I was sent out primarily to watch him. Of course, that was my business; I was a detective, but then I didn't what you say, spy on him. If I got a letter for him I did not open it. I was instructed to keep J. W. Mayfield under surveillance after Boyd left here—I don't know what the month was; it might have been in

(Deposition of Herbert G. Warvell.)

June. The first time I was instructed to keep him under surveillance and the first time I did keep him under surveillance was June, 1913, I think. While shadowing Mr. Boyd, I wrote down everything he said in connection with this case,—everything he said or did pertaining to the Koke Company. Those were my instructions, and I carried them out as nearly as possible. I made a report every day of everything he said or did pertaining to this company, as near as possible. Of course, you understand, each conversation was not always put down word for word, only when some direct statement was made, something that I thought was very pertinent to the subject. I carried my note-book around with me, and, when a statement was made, I marked it down at the time. You ask how I knew what statements were important and what were unimportant for my purpose; well, anything pertaining to the subject, for instance, of "Koke" or "Coca-Cola." To ferret out instances and cases of substitution where "Koke" had been substituted for "Coca-Cola," may have been one of the objects of my being employed. I was primarily instructed to find out instances of substitution. It was a part of my duty to ferret out cases of substitution, if the substitution was intentional, I might say. I don't remember any instructions at all where the substitution was unintentional, because, if the substitution was unintentional, it would, no [1533] doubt, be a mistake. I don't remember that I got any instructions of any kind as to how I was to ascertain if the substitution was intentional or unintentional.

(Deposition of Herbert G. Warvell.)

I remember a conversation by J. W. Mayfield like that mentioned in my direct examination, but I cannot say the exact date of it. The notes I have recalled it to me. Irrespective of the notes, I cannot say for certain that I would have remembered it, unless all of the circumstances would have been brought up, don't you see. The circumstances I refer to are those embodied in the case. I don't remember what time of day this conversation occurred. I think it was in the afternoon, but I cannot say whether it was in the late afternoon or in the middle of the afternoon. I cannot say definitely and certainly that it was in the afternoon and not in the morning. I do not know whether we were standing on the corner of the street, or in the middle of the block, when this conversation occurred. I don't remember anything else that was said because I did not put it down in my report. After we left the place where this conversation occurred, I don't remember where we went, or in whose company I walked,—I don't believe I read my notes that far. [1534]

Deposition of Maurice Wolff, for Plaintiff (In Rebuttal).

MAURICE WOLFF.

Direct Examination by Mr. ROGERS.

I am a detective in the employment of the Pinkerton National Detective Agency. I was employed during the month of April, and the following month, of the year 1915, by the Pinkerton National Detective Agency to conduct an investigation for the Coca-

(Deposition of Maurice Wolff.)

Cola Company. I was employed to go around and locate a man named Jerome Gibbons. The notes I hold in my hand are my reports of events which I made at the time they occurred, and they are in my own handwriting. I made notes of the things that happened that was of interest to my investigation, and then in the evenings when I went home I wrote out my report, and the papers that I have in my hand are the reports referred to. I received instructions from the assistant superintendent, W. J. Burns, to locate Jerome Gibbons for the purpose of making an investigation for the Coca-Cola Company, to find out what he was selling and what he was representing. I arrived at the Grand Saloon, 125 West Madison Street, at 12 o'clock Noon Friday, April 4th, 1913. While standing at the cigar counter, a young man entered answering the description given me of Gibbons. When he entered I overheard a man who was a regular patron in this saloon say, "There comes Coca-Cola." When Mr. Gibbons came in he spoke to two men about a bet he won on the horse races. I later discovered the name of the person who was alluded to as "Here comes Coca-Cola" his name is J. W. Mayfield. You ask if I recall, on April 8th, 1913, Mayfield's stating to me that he would have to leave me, and if I recall his obtaining a quart bottle from the cigar clerk and stating to me what it was; **[1535]** he then would leave me and he obtained a quart bottle from the cigar clerk of what he told me was "Coca-Cola." He said he would be able to sell a lot of it as there was no one

(Deposition of Maurice Wolff.)

who could tell the difference between the two syrups. Mayfield said there was no difference, that he sells it and bills it "Coca-Cola" and the trademark is the same. You ask if I was referring to the product sold by Mayfield under the name of "Koke"; yes, sir. (Objected to by defendant as leading and suggestive; overruled; exception.) Mr. Harper, soda dispenser at the drug-store at Clark & Van Buren Streets, told Mayfield he thought his boss would be ordering a barrel of "Coca-Cola" syrup as he was boosting it. While we were talking Carpenter and Lew Stern, soda dispenser for McLean's Central Drug Company, entered, Mayfield told him he sold the Central Drug Company five barrels of syrup on March 20th, and expected another order soon. Mayfield told Harper that he intends to see a Mr. Clark, buyer at J. R. Thompson's, he thinks he will be able to sell him some syrup. Harper and Stern said that he ought to be able to sell a lot of it as there was no one who could tell the difference between the two syrups. Mayfield said there was no difference, that he sells it and bills it as "Coca-Cola" the trademark is the same. Mayfield and I went to Diamond, the druggist at the Grand Pacific Hotel Building. Mayfield saw the manager and I overheard the manager say he could not use Mayfield's syrup. Mayfield then gave him a slip of paper, the same I attached to Tuesday's report. The Manager read it and said, "Then why don't you make the "Coca-Cola" people stop making it?" and Mayfield said something I could not hear. Mayfield then went to the soda clerk

(Deposition of Maurice Wolff.)

and told him the manager said he would see his lawyer and he would come and see him again. Mayfield also told the head soda clerk to try and persuade the manager to order [1536] the syrup and if he made a sale he would make it all right with him. Mayfield produced his order book and exhibited it to the clerk to show where he had gotten an order. As he opened the book the slightest it read "The Koke Co.," and he closed the book before I could see any more, as the clerk was busy and he had no time to talk. The slip I referred to a moment ago is the one marked Plaintiff's Rebuttal Exhibit No. 106. (Plaintiff here tendered and offered in evidence the slip referred to as Plaintiff's Exhibit No. 106.) The slip marked Plaintiff's Rebuttal Exhibit No. 107 is a price list which Mayfield gave me showing the prices that he got in the south for their stuff, and the Chicago prices. That is my handwriting on the bottom. On our way to the Grand Saloon Mayfield told me the retail price of his syrup is the only thing that is any different from the other syrup. He said the syrup comes in fifty gallon barrels and he sells it at $1.00 per gallon, while the "Coca-Cola" price is $1.50 per gallon. He also said he would undoubtedly sell considerable as he does the right thing with the head soda dispensers. During our talk he said the way his "Koke," can be sold easily is that most people at soda fountains ask for a drink of "Coca-Cola" as "coke" or "shot" or "dope" and it is not selling or misrepresenting "Coca-Cola" by serving "Koke." On April 12th 1913, shortly after 11.20 A. M., I had

(Deposition of Maurice Wolff.)

a conversation with Mayfield during which he told me that he could earn a thousand dollars a month if he would work every day. He told me he would give me twenty per cent commission if I would sell "Koke," and that no one could stop me from selling it as "Coca-Cola." He gave me the enclosed circular, "To Whom It May Concern"; and also showed me a typewritten copy of a statement signed by Mr. Murphy and Mayfield stating that in the year 1888 a Mr. Pemberton was in business in Atlanta, Georgia, manufacturing soda-water syrups, and also "Coca-Cola," and the [1537] trademark, that for a consideration of two thousand dollars from each he took Mr. Murphy, Mayfield and Bloodworth in partnership with him, giving them equal rights in his business, and also formulas and trade marks he had, and then, later, Mr. Pemberton sold to a Mr. Candler, or some similar name, the formula for "Coca-Cola" for a consideration of two thousand dollars without the consent of his partners. Mayfield then stated to me if I wanted the agency for the syrup, that I could sell it, bill it and ship it as "Coca-Cola" and nothing would happen to me, as he knows he has the "Coca-Cola" people very uneasy, as this is the first time anyone had endeavored to sell "Koke" north of St. Louis. He also said the headquarters was in St. Louis, but the "Koke" was made in New Orleans. At 11.45 A. M., April 14th, 1913, Mayfield asked me to accompany him as he intended to call on some dealers. He carried his bottle of "Koke" and went to the Tea Room at 19 North

(Deposition of Maurice Wolff.)

Washington Avenue, where he introduced his syrup as "Koke," and also spelled it, says it is the same as "Coca-Cola." The dealer asked if he shipped it as "Coca-Cola" and Mayfield said he did not, as it came from another state, but the Koke Company intended to start an office here and make the syrup and would then label it "Coca-Cola." The man tried a glass of "Koke" and said he could not taste any difference, but said he had a gallon keg of "Coca-Cola" on hands, and, if he would come around about June 1st, he might give him an order for some "Koke." We then went to the confectionary store in the Postal Telegraph Building, and Mayfield introduced his syrup as "Koke," and the proprietor told him he had sold "Coca-Cola" since 1893 and would not change; and if his syrup [**1538**] was the same as "Coca-Cola," then he ought to sell it as such, but that it would be impossible for him to serve "Koke" to his patrons if they asked for "Coca-Cola." Mayfield explained to him that eight out of ten customers in ordering "Coca-Cola" asked for "coke." The man said "That may be true, but they mean, and I know they want 'Coca-Cola.'" Mayfield gave the man a circular similar to Plaintiff's Rebuttal Exhibits 106 and 107. On June 7th, 1913, I met J. W. Mayfield accidentally, and during our conversation he told me he sold seventeen barrels of "Koke" to the following concerns: The Fair Department Store, Seagle, Cooper & Company; the Whiteside & Riverview Parks; also said that A–1 Soda dispenser formerly with McLean Drug Company, had a new posi-

tion and he expected to get an order from him. Mr. Harper, formerly with Krouscut Drug Company, had a new position with the Berry Candy Company, he told me he had to see a party and had to leave, saying he missed me and wished I was around. You ask if Mayfield ever had a conversation with me concerning his domestic affairs, and you ask whether or not he made the following statement: "That he is rooming with an Irish girl and had been rooming with her for the past four years, that they were not married; that she traveled with him, and that when he leaves town she always accompanies him, but that she always buys her own ticket, but that he gives her the money, that the reason for this arrangement is that he does not want to get into trouble for taking her from one state to another and that she has been in twenty-seven states with him"; Yes, sir.

(Defendants object to the question and answer [1539] because the question is decidedly leading and suggestive, and is just putting the words in the witness' mouth. Objection overruled; exception.)

Cross-examination by Mr. LITTLETON.

Yes, sir; I have some independent recollection of the things I have testified about aside from these notes. Yes, sir, it is a fact that I have read each of my answers to the questions that were asked me, from these notes. When any question was asked me I just read from my notes as my answer to the question. I am an investigator for the Pinkerton National Detective Agency and have been a detective for pretty near five years. I was employed in in-

(Deposition of Maurice Wolff.)

vestigating facts with reference to this lawsuit for probably a month, during the month of April, 1913. My instructions were to find out anything that had to do with the Coca-Cola Company, that is, with Mayfield and the Coca-Cola Company. No, I was not sent out to shadow this man Mayfield, nor was I sent out to keep him under surveillance. I became acquainted with him just hanging around the saloon where he hung out, the Grand Saloon. I was instructed to go and stay with him and be in his presence as much as possible. No, sir, I don't consider that keeping him under surveillance. I read from my notes here instead of testifying straight out off hand in answer to the questions on direct examination because I wanted to refresh my memory. I don't know that I could have stated it without referring to my notes. I have now read my notes through completely. I couldn't tell you just now which parts of my testimony I could have remembered without referring to *the* [1540] my notes. I am still in the employ of the Pinkerton National Detective agency. Yes, sir, I read my notes over before I came into this room to testify.

Redirect Examination by Mr. ROGERS.

The occurrences concerning which I testified took place during the year 1913.

Recross-examination by Mr. LITTLETON.

I don't know whether Plaintiff's Rebuttal Exhibit No. 106 is the one which I attached to my report or not. There is nothing on there to identify it as the particular one I had, but I can identify this Rebut-

(Deposition of Maurice Wolff.)

tal Exhibit No. 107 as the one I had because I wrote on it and it has my handwriting on it. [1541]

(The following deposition was taken by plaintiff as its rebuttal testimony at Charleston, West Virginia, on June 11th, 1915:)

Deposition of Claud W. Hickel, for Plaintiff (in Rebuttal).

CLAUD W. HICKEL.

Direct Examination by Mr. HIRSCH.

My full name is Claud Wallace Hickel; I am twenty years of age, and reside at 423 State Street, Charleston, West Virginia. Formerly I worked for the Anti-Monopoly Drug Company, at Acala, Florida, for about two and one-half years. I left there this last June. At first I worked at the fountain for three or four months, and then the druggist left and I took his place, but I attended the fountain at different times; for instance, at noon and in the morning before anybody came. Yes, sir; I was acquainted with the syrup that they used at the fountain there. During the time I was employed by the Anti-Monopoly Drug Company they did not have a drop of "Coca-Cola" there that I know of. Yes, sir; they had calls for "Coca-Cola" at the Anti-Monopoly Drug Store, and syrups or drinks were dispensed in the place of "Coca-Cola." I think I was in Ocala, Florida, at the time the "Coca-Cola" people brought suit against the Anti-Monopoly Drug Company, but I am not positive. I was there about the time the suit was discussed. I have talked about

(Deposition of Claud W. Hickel.)

the suit with Mr. H. C. Groves, the Manager of the Anti-Monopoly Drug Company. I cannot recall the conversations I had with him, I cannot give the exact conversations. The substance of it was that he wanted it to be known that he was not substituting for "Coca-Cola." He wanted me to make it known before the Court in this case that he was not substituting anything for "Coca-Cola," but that he was [1542] selling "KOKE" as "KOKE." If a person came in and asked for "COCA-COLA," he would say, "Dope?" and pump it. No, I did not myself carry out that procedure at the Anti-Monopoly Drug Company,—that is, when a person would call for "Coca-Cola" I would not say "Dope?" and pump it—sometimes I did, but other times I didn't, the same as he did. Mr. Groves himself served at the fountain at times. I noticed that on these occasions he did not say "Dope?" and then pump it.

Cross-examination by Mr. LITTLETON.

I am now in the drug business, employed by Krieg & Price, No. 1 of this city. We have no soda-fountain. I have been here ever since I left Ocala, Florida, with the exception of four or five weeks, during which I took a vacation. I went to work for the Anti-Monopoly Drug Store two and a half years ago; I quit there last June; I am now twenty years old. The Anti-Monopoly Drug Company kept its various syrups in the rear of the drug store. Besides myself, the others working there were: Elmer Small, John Allen Ritchie, Gracey Thompkins, Ray Ferguson, and a fellow named Alfred Adcock,—that is all

(Deposition of Claud W. Hickel.)

I remember right now. Elmer Small, John Allen Ritchie and Gracey Thompkins and Ray Ferguson were at the soda fountain. Adcock was the druggist when I came there. These people were employed at different intervals. I cannot remember them in rotation, but they came and went while I was there. None of these people was employed as soda-fountain dispenser while I was employed as dispenser. We usually had there only one dispenser. Everybody put the syrups in the fountain to make the drinks, but it was the porter's duty; however, he very seldom did it,—just different ones of us did it. [3543] Each one of these different gentlemen must have, at some time or other, put the syrup in the fountain; I have done it myself. I put in the fountain the fruit syrups, root beer and I don't know what I put in there for "Coca-Cola," I don't know what it was. I think it was "Koke,"—sometimes it was. Dr. Groves didn't always tell me what it was; he had several different kinds of things. I had to depend on what it was by what somebody else told me, because the barrels were not always labeled. When they were not labeled, of course, I did not know what was in them. Yes, sir; the drinks which I did not know what they were, looked like "Coca-Cola" and tasted very similar to it. I could tell the difference in taste, but everybody couldn't have told it. I knew the difference between it and "Coca-Cola," and when we changed the brand, I could tell. I could tell one of these substitutes from the other,—at times I could tell that he didn't have "Coca-Cola."

(Deposition of Claud W. Hickel.)

He sold something very similar to "Coca-Cola," very few people could tell the difference unless they were habitual users. I, myself, couldn't tell at times; for instance, one barrel would come in and the taste was very similar, and I couldn't tell the difference, but another would come in and would not be just like it. Now, the barrel that tasted so similar to "Coca-Cola," I couldn't tell the difference between it and "Coca-Cola," I couldn't tell, of my own knowledge, whether it was "Coca-Cola" or not, except that the barrel was not labeled. I didn't go down to the depot to get the barrels. Really, I don't know whether it come in red barrels or not. The fact of the business is I don't remember all of the labels on the different barrels. The only way I could tell whether the **[1544]** stuff was "Coca-Cola" or not was by looking at the barrels; if they were labeled I could tell what was in them; if they didn't have any labels on them, I couldn't tell what it was. You say, so far as I know, it might have been "Coca-Cola" in the barrels which I say were not labeled; no, it was not "Coca-Cola," because Dr. Groves said it was not; he told me it wasn't "Coca-Cola." Yes, sir; he told me what every barrel was when it came in, but I don't remember what he said it was. As well as I remember he said he bought from four or five different houses,—he bought at times from the Wise-Ola Company. The only way I had of telling what was in the barrels, except what somebody told me, was by the label on the barrel. Otherwise the barrels looked pretty much alike, except some were

larger and some were smaller. I could tell what the stuff was when I opened the barrel and saw that it wasn't "Coca-Cola," but I knew it was used for "Coca-Cola." I knew it was used for "Coca-Cola" only by what he said, what Dr. Groves told me. I couldn't remember any special occasion when he told me that. He took it as a joke that was selling this stuff for "Coca-Cola." No, I did not take it as a joke, nor did I take it seriously,—I didn't pay any attention to it. I knew that he could be prosecuted for it, if it were found out. No, I didn't know that I could be prosecuted for substituting it, also. I did, in fact, substitute it. I did practice a fraud on my customers there, and did so for two and a half years. I cannot tell you what the particular substitute was in every particular instance that I did substitute. I saw several of Dr. Grove's bills. He had several different products at several times. I couldn't say positively that it wasn't "Coca-Cola," but I had a pretty good **[1545]** idea that it was not; I got that idea nowhere except from his word. Aside from that, I didn't know, I couldn't tell whether it was "Coca-Cola" or not. I had no way of analyzing it. I cannot tell by tasting it always, but at times I could, very frequently I could. No, "Coca-Cola" does not always taste the same to my palate. He never had a "Coca-Cola" barrel in the house as long as I was there. The way I distinguished the "Coca-Cola" barrels from those other barrels I have mentioned, is because they always label them. I hardly think it possible that a "Coca-Cola" barrel could

(Deposition of Claud W. Hickel.)

come in not labeled, because I never saw but one but what was labeled. Yes, it certainly is possible for it to come in not labeled; it is possible, but not probable. I imagine I have seen quite a few "Coca-Cola" barrels in my life. Before I went with Dr. Groves I worked at the PostOffice Drug-Store, but I don't know exactly how long, and then I worked for Dr. Anderson, as relief clerk, as well as I remember, about three weeks. They didn't have a soda-fountain at Anderson's, but they did at the Post-Office Drug-Store, and I was at the soda-fountain there and drew the syrup. At that place we dispensed "Coca-Cola," root beer and soda water of fruit syrups. The only difference, in my mind, between the barrels I have seen these other drinks I have mentioned come in and the "Coca-Cola" barrel, is that the "Coca-Cola" barrels that came to the Post-Office Drug-Store were all labeled,—they had big labels on the head of the barrel. Why, yes; that was the only way I could tell the difference between the "Coca-Cola" barrel and the barrels containing these other drinks,—they were very similar. The Anti-Monopoly Drug-Store was a corporation. **[1546]** Besides Dr. Groves, Prof. W. Wiley was a stockholder. He is Professor at Fusidin College at Ocala, Florida. Yes, sir; I knew at all times just what particular syrup I had in the fountain, whether it was Wise-Ola or Rye-Ola, or whatever it happened to be,—not each particular kind, but sometimes I knew that the barrels was Wise-Ola, and other times I knew that the barrels was "Koke" I believe it is. I am not certain about

(Deposition of Claud W. Hickel.)
this "Koke"; I only had Dr. Groves' word for it. No, sir, I didn't observe the stencil on the head of the barrel. I remember sometimes there was a kind of monogram of coca leaves, or something like that, some kind of tropical plant on the head of the barrel, on the label. That was on one of the barrels, I don't know which it was. Yes, sir; I know what coca leaf is. I have heard of it a great deal, we use it quite often in the drug-store. If I heard a drink called "Lemon-Orange" I would imagine it would be composed of a combination of lemon and orange; if I heard a drink called "Lemon-Cola" I imagine it would be something similar to "Coca-Cola" with lemon, or something like that. When I heard this drink called "Coca-Cola," I suppose it has to have the coca leaves in it. I am not licensed to practice pharmacy, nor have I an assistant's diploma. Yes, sir, I have been working as a drug clerk, mixing prescriptions in this State, as well as in the State of Florida, without a license. No, sir; I have not studied pharmacy at any school. No, sir, we did not frequently have two of these cola drinks I have mentioned in the fountain at the same time. I kept them in two spigots. I cannot say that I didn't have "Wise-Ola" and "Rye-Ola" in the fountain at the same time. I might [1547] have had two of the same kind of drinks in the fountain at the same time. So far as I know I might have had "Wise-Ola" in one of the spigots of the fountain and in the other spigot this thing that had this tropical plant on the barrel. I don't remember the name of the drink

(Deposition of Claud W. Hickel.)

that had this tropical plant on the label. The syrup that was very similar to "Coca-Cola" was the last one he had, I think, which he called "Koke." You ask if that was the one that had this tropical picture on the head of the barrel; I don't know which one it was. It may have been the one he called "Koke," and it may have been another one. When a customer came in and asked for "Coca-Cola" I served from the handiest spigot, I don't know what you would call those drinks that were in those two spigots —substitutes for "Coca-Cola." We called them "dope," "coke"—whatever the customer asked for.

"Q. 155. What names did you use to classify those drinks?

"A. We generally called them 'dope.'

"Always during those two and a half years that I was there I kept those always in the same two spigots, so far as I remember. Yes, sir, the spigots got out of order quite often during the time I was there, and one or the other of these "dope" spigots frequently got out of order, but it didn't take but about three seconds to fix it if there was any trouble. We sometimes changed them to scrub them, but we would put them back in the same container as soon as we were through. The spigots were never changed, so far as I know, during the time I was there. They were the first two on the right of the carbonating arm as I stood behind the counter [1548] facing the people. I had no instructions as to which spigot I was to draw the syrup from. I was first approached with reference to testifying in

this case by F. C. Peace, a "Coca-Cola" detective. I talked to him while I was down in Ocala, Florida. He approached me and questioned me with reference to my connection with the company down there. That was while I was still employed at the Anti-Monopoly Drug Store. I don't remember what they questioned me about. All I know is that I ignored them and didn't pay no attention to them. I have never dispensed soda water at any other fountain where they had some of these other coca-cola drinks, —not to my knowledge. If they had anything else but "Coca-Cola" they were pretty shrewd and kept it from me. I got the idea that all these drinks were substitutes from Dr. Groves, who told me when I first went to work for him that all his drinks were substitutes. By "substitutes," I mean something to be served in competition with "Coca-Cola," to be served in the place of it. You ask how many drinks of this sort I have run across; I think four or five would cover it. They were all about the same color and all had a similar taste. A majority of the customers at the Anti-Monopoly Drug Store could tell the difference between the drinks that we were selling and "Coca-Cola." I have had them refuse the drinks we sold. I suppose about one out of every twenty-five or thirty would do so. The reason why I know that a majority of them could tell the difference between the drinks we sold and "Coca-Cola is because they would tell me so. We had some customers that came there every day or two to our place and they usually came to our fountain.

(Deposition of Claud W. Hickel.)

The majority of our customers,—what I mean, regular customers—didn't ask for "Coca-Cola." They asked sometimes for "dope" and **[1549]** sometimes "coke," but they knew they were not getting "Coca-Cola."

Redirect Examination by Mr. HIRSCH.

When people came to a soda-fountain and asked for "dope" or "coke," I understand they wanted "Coca-Cola."

Recross-examination by Mr. LITTLETON.

When a man comes into the sode-fountain and asks for "dope" he is under the impression that he is getting "Coca-Cola." I know he is under that impression, because that is the name that has become a nickname for "Coca-Cola." You ask how I got that in my head. Why, it has always been there. When they ask for "Coca-Cola," they say "dope." I always knew before this that "dope" was a nickname for "Coca-Cola." I cannot answer how I found out that "dope" was a nickname for "Coca-Cola." **[1550]**

(The following depositions were taken by Plaintiff as its Rebuttal Testimony in New York City, on June 14th, 1915:)

Deposition of Ernest Higgin, for Plaintiff (in Rebuttal).

ERNEST HIGGIN.

Direct Examination by Mr. HIRSCH.

I am fifty years of age and reside at 51 Van Houten Avenue, Passaic. New Jersey. I formerly worked

(Deposition of Ernest Higgin.)

at Coshocton, Ohio, from the 6th day of September, 1898, to June 24th, 1911. I started with the Standard Advertising Company, which later consolidated with the Meek & Beach Company. Then Mr. Beach severed his connection with the concern and it was called the Meek Company, and then that was recognized and then called the American Art Works. I had charge of the pressroom, or printing department, and all printing work went practically through my hands. All printing or signs and everything of that kind went through my hands. All advertising matter went through my hands. They had a branch there which was simply called the gum process, but that didn't amount to anything until later years, about the last three years of my connection with the firm. This gum process department engraved a composition which was rubber vulcanized, they made a few sign that way. You ask whether, during my connection with the three concerns I have named, there was any advertising of any kind or character that went through any of those concerns with the name "Koke" on it; no, sir, I don't remember that, it is blank to me. I don't remember any name like that. I remember some advertising with the name "Celery-Cola" on it.

Cross-examination by Mr. LITTLETON.

I have been in the printing business about thirty-five [1551] years. I was practically superintendent of the printing department, for each of these concerns above mentioned. Our company printed advertise-

(Deposition of Ernest Higgin.)

ments for numbers of companies all over the land. It would be difficult to say how many concerns we printed advertisements for during that time—I think it must have been as high as 200 orders we handled, but the reason I remember the soft drinks is because there were very few of those advertised on metal, such as "Coca-Cola." I remember them, because we done their work so many times. We handled their work for a great number of years. These "Celery-Cola" people used to advertise extensively, but other soft drinks, very seldom. They were considered in our line as a cheaper grade of work, because metal advertising was expensive. I do not remember the name of the company for which we did the "Celery-Cola" printing, nor do I know where it was located, nor when the printing was done. I believe we done 5,000 transparencies for them, I don't remember anything about the time during which we printed these advertisements for them. We also printed advertising for a ginger-ale concern and for root beers. One of the brands of the different root beers which we printed advertisements for was "Hires." There was another small firm in Cleveland we done a small job for, but I cannot quite recall their name. There was another firm in Cleveland that imitated "Coca-Cola" very closely; we only done a job for them once. That was along about 1910 or 1911. I don't remember any other soft drinks for which we printed advertising about the time we printed this "Celery Cola" advertising other than those I have already mentioned. There was very few. [1552] We did this "Celery-

(Deposition of Ernest Higgin.)

Cola" printing about 1909 or 1910, as near as I can recall. Yes, sir; I mean to say that in 1910 there were very few soft drinks being advertised,—that is, on metal. You ask if that was the only kind of printing we did; we done metal, and we done transparencies, that is a sign you paste on,—a good many of them are gummed on windows. I was in charge of that gum process from 1908 to 1911; I was not in charge of it prior to that time, because it was practically a very small department. I am connected now with the Passaic Metal Ware Company, still doing the same kind of business. You say that the fact of the matter is that I have handled so many different kinds of advertising over so long a period that I couldn't possibly remember all the kinds of advertising printing I did; there might have been some slip in my memory, but advertising for several years was confined to practically beers, liquors, wines and a few soft drinks. The only ones I can remember now are "Celery-Cola" and "Coca-Cola." There was one more in Cleveland that imitated "Coca-Cola." It started with a K, "Kola-Kole," I think it was, but those are the only soft drinks that I can remember. There may have been others that have slipped my memory at this time. [1553]

Deposition of Henry Hartman, for Plaintiff (In Rebuttal).

HENRY HARTMAN.

Direct Examination by Mr. HIRSCH.

I am fifty-one years of age and reside at Passaic,

(Deposition of Henry Hartman.)

New Jersey. I am with the same company as Mr. Higgin. I formerly lived in Coshocton, Ohio, from December, 1898, until July, 1911. I was with the Standard Advertising Company, the Meek & Beach Co., the Meek Company, and the American Art Works during that period. I was in the lithographic art department of those concerns during that entire period. I do not remember any advertising of any kind or character with the name "Koke" on it during the time I was with the concerns I have mentioned.

Cross-examination by Mr. LITTLETON.

I don't remember whether or not we got out lithographed pictures, or posters, and sold them to various parties indiscriminately, who later, after buying them, had their names and products printed on them, like calendars, posters, and hangers. It may have been done in some other department. I was in the lithographic art department which was the same department that Mr. Higgin was in. I was superintendent of that department; I had charge of that department during the whole time I was there as foreman. There is no difference between superintendent and foreman; it is practically the same thing. No, they did not have two superintendents in that department, they just had one. I have been in the business now thirty-four years altogether. I could not give you any idea as to how much advertising matter we have turned out during that time, nor could I remember all the kinds of advertising I have turned out. **[1554]** There was a great amount turned out. I remember fairly closely the names of the com-

panies for which we have turned out advertising, but I couldn't remember all of them; that would be too much. I remember the names of the products fairly well. I remember the names of all of the products advertised during the past twenty-four years fairly well, and I am still in that same business. The different products we have advertised have been all classes of commodities. During the past thirty-four years we have advertised such soft drinks as "Coca-Cola," "Mova-Cola," "Celery-Cola," "Red Cherry Phosphate," and things of that kind. Those are all the soft drinks we have ever advertised in the past thirty-four years,—at least that is all I can remember by name. There may have been others whose names have slipped my memory. There were some waters we advertised, "Mount Laurel Springs" and Lithia waters, I couldn't remember all of those. I don't pretend to remember the names of all the different commodities advertised in the past thirty-four years. Our business was so large and so varied that I couldn't remember all of soft drinks advertised since 1900. I could remember nearly all of them, however. No, I couldn't right now remember how many drinks we have advertised since 1900. I could not recall at this time all the names of all the soft drinks we have advertised; that is an awful amount, soft drinks. I couldn't say how many soft drinks we have advertised from 1900 down to date, but it is a great many. Roughly guessing, I should judge about twenty-five.

(Deposition of Henry Hartman.)

Redirect Examination by Mr. HIRSCH.

In these concerns I worked for Mr. Higgin had charge [1555] of all the presses and was practically the superintendent over all.

Recross-examination by Mr. LITTLETON.

No, I did not work in the gum process department. I don't know what went on in that department, Mr. Higgin had charge of that.

STIPULATION.

It is agreed and stipulated by and between counsel in the above causes that the testimony of the witness Harrison Ferguson, of Spartanburg, South Carolina, taken at Atlanta, Georgia, and the exhibit thereto, shall be, and is hereby, suppressed. It is further agreed and stipulated that the testimony of Leaver, of Spartanburg, South Carolina, taken at Atlanta, Georgia, so far as it relates and pertains to testimony and the exhibit of the witness Ferguson, shall be, and is hereby, suppressed; that part being suppressed being the redirect and recross-examinations. It is further agreed and stipulated by and between counsel in the above-styled causes, that the testimony of Mrs. Rufus H. Paige, nee Miss Alice Wheeler, to be taken at Spartanburg, South Carolina, shall not be taken, but her testimony is hereby agreed to between counsel, and the following shall be read as if Mrs. Rufus H. Paige had appeared and testified in accordance with the rules of the Court, and her testimony shall be read as if [1556] she had so appeared, the agreed statement of facts being as follows:

"The said Mrs. Rufus H. Paige, nee Miss Alice Wheeler, worked for the J. C. Mayfield Manufacturing Company, or the Celery-Cola Company, as bookkeeper, and stenographer, during the year 1906, and that if the said Mrs. Paige had been placed on the stand she would have testified substantially as did Miss Annie N. L. Bonham, who testified on behalf of the plaintiff at Birmingham, Alabama." [1557]

(The following depositions were taken by plaintiff as its rebuttal testimony at Atlanta, Georgia, on June 21st, to 24th, inclusive, 1915:)

Deposition of H. B. Pierce, for Plaintiff (In Rebuttal).

H. B. PIERCE.

Direct Examination by Mr. HIRSCH.

Mr. HIRSCH.—Mr. Littleton has asked me to produce certain contracts, and I herewith produce to Mr. Littleton contract prepared by the office of Candler, Thomson and Hirsch, which we will call Plaintiff's Rebuttal Exhibit No. 110; and I produce a Jobber's Contract of the Coca-Cola Company for 1914, which we will call Exhibit No. 111; and I produce Dispenser's Contract for 1914, which we will call Exhibit No. 112; I produce Jobber's Contract for 1915, which we will call Exhibit No. 113; and I produce Dispenser's Contract for 1915, which we will call Exhibit No. 114. The documents referred to are tendered and offered in evidence as Plaintiff's Rebuttal Exhibits Nos. 110 to 114, inclusive.

(Defendants object to any testimony on the part of

(Deposition of H. B. Pierce.)

H. B. Pierce, because he was present during the taking of all the testimony in chief of the plaintiff, and during the taking of practically all the testimony of the defendants, and was present during the taking of a good part of the plaintiff's rebuttal testimony, and was not under the rule. Objection overruled; exception.)

I reside in Atlanta, Georgia, where I have lived for the last five years. Prior to my coming to Atlanta, I lived in Philadelphia, Pennsylvania. At Philadelphia I was employed by the Pinkerton National Detective Agency, as Assistant Superintendent, head of the Criminal Department. [1558] When I moved to Atlanta, I became superintendent of the Southeastern Division, Atlanta office of the Pinkerton National Detective Agency. I was with that detective agency here in Atlanta for three years. I am thirty-nine years of age. At present I am in charge of investigation work for the Coca-Cola Company. Pursuant to my investigation work for the Coca-Cola Company, I visited the Yellow Pine Pharmacy at Hattiesburg, Mississippi. From complaint made regarding the product being sold by the Yellow Pine Pharmacy as and for Coca-Cola, I ordered an investigation, made of that place of business. After that investigation, an analysis was made from samples secured from that concern, which they sold as and for "Coca-Cola," which analyses and report showed that the samples secured were not "Coca-Cola."

(Defendants object to the statement as to what the

analysis showed, because hearsay; overruled; exception.)

After receiving these reports I went to Hattiesburg, Mississippi, and called on Mr. Jones, the proprietor and manager of the Yellow Pine Pharmacy. It was J. B. Jones, I think. I called on Mr. Jones for the purpose of seeing if we couldn't make some agreement or arrangement with him whereby he would discontinue the practice of fraudulent substitution in regard to "Coca-Cola" with a view of preventing any litigation. I saw Mr. Jones, who acknowledged that for more than a year he had been substituting a product known as "Ko-Nut" as and for "Coca-Cola," and that, during the two years' time that he had been doing that, that he had sold upwards of eighteen barrels of "Ko-Nut" against one or two barrels of "Coca-Cola," and that for the entire year 1913 he had not bought any "Coca-Cola." [1558½] I endeavored to get Mr. Jones to enter into an agreement with the Coca-Cola Company to stop that practice, and he requested to be allowed to consult his counsel, which was agreeable, and he consulted Stephens & Cook, who, upon being made acquainted with the facts by myself, and shown all the reports, together with the analysis, instructed Mr. Jones to enter into an agreement with the Coca-Cola Company, which he did. That agreement has not been put in evidence. It was in the form of letters from counsel. The letter dated February 18th, 1914, from James E. Jones to H. B. Pierce, care Candler, Thomson and Hirsch, Atlanta, Georgia, is a letter re-

(Deposition of H. B. Pierce.)

ceived by me on or about February 20th, 1914, from Mr. James E. Jones as result of my interview with him.

(The letter referred to was offered in evidence as Plaintiff's Rebuttal Exhibit No. 115.)

I next visited the Owl Drug Store at Hattiesburg, Mississippi, E. J. Williams, proprietor. After an investigation had been made of the product being sold by the Owl Drug Company, at Hattiesburg, Mississippi, I called on that concern on February 13th, 1914, and saw Mr. E. J. Williams, the younger member of the firm, and took up with him the reports of the investigations made,—together with the reports of the analysis made of the product being sold by their concern, as and for "Coca-Cola," with a view of reaching an adjustment and having the practice of fraudulent substitution remedied. When I first approached him, Mr. Williams became very disagreeable and was very bitter against the Coca-Cola Company and all of its representatives, particularly one of its traveling salesmen, who, he claimed, had been disagreeable **[1559]** to him, with the result that he had decided that any unfriendliness towards the Coca-Cola Company would be justified on his part. Mr. Williams admitted that he had handled considerable of a product known as "Ko-Nut," and, also, that he handled some "Coca-Cola," stating that when he had distinct calls for "Coca-Cola" it was the practice to serve "Coca-Cola," but when any nicknames were used for "Coca-Cola," such as "coke" and "dope," or any names of that character, that they

(Deposition of H. B. Pierce.)

always made it a practice to serve some imitation product, particularly the "Ko-Nut." Mr. Williams admitted freely that it was his understanding that the terms "dope" and "coke" were "Coca-Cola," but stated that it didn't make any difference to him or his partner in the business as to what they understood, that he would give the puble what they pleased. In addition to that, he stated that he was a member of the Mississippi Pharmaceutical Society, and that it was his purpose, together with the aid of his brother, to endeavor to get this society to boycott "Coca-Cola" in the State of Mississippi; that he had conferred with the Yellow Pine Pharmacy, of Hattiesburg, and the Love Drug Company, and the Corner Drug Company, which was then run by Thornton, and had practically secured agreements from them that they would discontinue the handling of "Coca-Cola" and handle nothing but imitation products.

(Objection by defendants because not proper rebuttal, no foundation having been laid for such testimony in the cross-examination of defendants' witnesses. Overruled. Exception.)

I stayed with Mr. Williams something like two hours, [1560] between twelve-thirty and possibly two-thirty; before leaving him he said he would take up with his brother the question of agreeing with the Coca-Cola Company to stop the handling of these imitation products, and that I could see him later in the day. During that interview Mr. Williams admitted a number of times that there was a probabil-

(Deposition of H. B. Pierce.)

ity that some of this "Ko-Nut" and other imitation products that they had handled had been sold for "Coca-Cola"—that in the rush of business they didn't charge themselves with being particular as to what the customer asked for, or as to what the customer got, whether they asked for "Coca-Cola," "coke" or "dope," and that if customers were served an imitation product when "Coca-Cola" was asked for, it was a mistake that no business man could be charged with responsibility for. I called on Mr. Williams again about eight-thirty that night, at which time he was about seven-eighths drunk and in a very disagreeable mood. I met him in the center of the store—he had a customer with him at the time—spoke pleasantly to him, and asked him what his brother had decided regarding entering into the agreement with the Coca-Cola Company, and he stated that he had taken it up with his brother, and that they had also taken it up with an attorney in Hattiesburg, by the name of A. M. Foote, and that on account of this consultation they had decided they would not discontinue the practice and that the Coca-Cola Company could sue and go to hell as far as the Owl Drug Company was concerned, that they would continue their practice. Now, during the intervals that I was there, I went into the back of the Owl Drug Company and saw there a fifty-gallon barrel of the product "Ko-Nut" and called Mr. Williams' attention to it, and he admitted that he had been purchasing [1561] "Ko-Nut" for three years and proposed to continue to do so. He stated

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they had used about four hundred gallons of "Ko-Nut" syrup a year and possibly about two hundred gallons of "Coca-Cola." Mr. Williams admitted several times that it was his understanding, and, also, other members of the firm, that "coke" and "dope" were nicknames for "Coca-Cola," and had been for years. I then went to the place of Burton Jones, of the St. Elmo Drug Store, at Chattanooga, Tennessee. As a result of investigations made at that place, and of samples of syrup secured which that concern was dispensing as and for "Coca-Cola," I called on Mr. Burton Jones on January 9th, 1914, at about 5 P. M. I saw Mr. Jones, and informed him of the result of our investigations, and, also, that, before taking the matter any further, we desired to see him and see if we couldn't reach some agreement whereby he would stop the practice of substitution and avoid any further trouble through litigation or otherwise. Mr. Jones at first denied that he was guilty of substitution, but when shown the report of the investigators and the result of the analysis of the syrup taken from his fountain, he stated that it was possible that he had for a short time substituted a product by the name of "Tru-Cola" for "Coca-Cola," that they had recently moved into the place they were then occupying and that at the time of their removal, they had run out of "Coca-Cola" and had some "Tru-Cola" left of a fifteen-gallon purchase that they had made some time ago, and that it was possible that some of the "Tru-Cola" was the syrup which our investigators had purchased at the time. I then went into the moral

(Deposition of H. B. Pierce.)

side of business of that kind, and Mr. Jones admitted freely [1562] that it wasn't the proper thing to do, and stated that, beginning with the year 1913, he had entered into a new partnership—I didn't see the partner at that time—and that he would take the question up with him and he believed the best thing to do would be to enter into the agreement, as there was a possibility that there had been some substitution going on. He also stated that at their previous place of business Mr. Fred W. Wesenberg was Mr. Jones' partner, and, during all of this time that they had never handled any "Coca-Cola," but always handled an imitation product, but since his new partnership they had discontinued it and handled "Coca-Cola," with the exception of the fifteen-gallon purchase of "Tru-Cola" which I mentioned before. Mr. Burton Jones agreed to sign the agreement, and, before doing so, he said he thought he would include their Alton Park Store, which I knew nothing about, requesting that I wait until about 6:30 until his partner returned to the store, so that he could consult him about it, and, on his return, this agreement was signed. The agreement referred to is filed as Plaintiff's Rebuttal Exhibit No. 116.

(Plaintiff here tendered and offered in evidence the document referred to as Plaintiff's Rebuttal Exhibit No. 116.)

I then visited the place of business of C. P. Embrey, of Chattanooga, Tennessee. After an investigation had been made in connection with the business of Chas. P. Embrey, who we had information

(Deposition of H. B. Pierce.)

was somewhat of a notorious substitutor, I went to his place of business on January 9th, 1914, about noon, and saw Mr. Embrey and acquainted him with the results of our investigations, Mr. Embrey became very nervous **[1563]** and stated that for a couple of years, on account of very poor business and low financial condition, he had been compelled to buy a cheap product,—the product itself being "Ko-Nut,"—and that during the entire years of 1912 and 1913 he had purchased something like eight barrels of "Ko-Nut," and that during the year 1912, he had purchased only one barrel of "Coca-Cola," about forty-six gallons, and that during the year 1913, he had only purchased about 10 gallons of "Coca-Cola." Mr. M. Duff, who was then manager of Fritts & Weihl, Wholesale Druggists, in Chattanooga, was with me and Embrey at the time, and I had luncheon engagement with him, and through Mr. Duff, I verified Mr. Embrey's purchases of "Coca-Cola" for the years 1912 and 1913.

(Defendants object to Mr. Duff's verification as being, of course, hearsay; overruled; exception.)

Embrey freely stated a number of times during our conversation that he thoroughly understood the terms "dope" and "coke" to be nicknames for "Coca-Cola," and that he knew that, when customers came to his fountain and asked for "dope" and "coke" they meant "Coca-Cola," an expected to be served "Coca-Cola," and that the reason he served a substitute was because it was cheaper and because of his alleged financial condition.

(Deposition of H. B. Pierce.)

(Objected to by defendants because no foundation was laid for such rebuttal testimony in the cross-examination of C. P. Embrey. Overruled. Exception.)

Before leaving Mr. Embrey I had him sign an agreement with the Coca-Cola Company that he would discontinue his practice of fraudulent substitution. The document **[1564]** marked Exhibit No. 117 is the agreement that Mr. Embrey signed.

(Plaintiff here tendered and offered in evidence the document referred to as Plaintiff's Rebuttal Exhibit No. 117.)

I then visited the place of business of Boyd & Jackson, at Kosciusko, Mississippi. After an investigation had been made in connection with the business of Boyd & Jackson, as far as the product "Coca-Cola" was concerned, and after it had been determined by analysis that the samples secured from them were not "Coca-Cola," I called at the place of business of Boyd & Jackson on February 11th, 1914, between 8 and 10 P. M. and had an interview with Mr. Boyd, one of the proprietors, and took up with him the question of substitution, with a view of having him agree with the Coca-Cola Company that he would discontinue the practice and avoid any further trouble. Mr. Boyd at that time desired an opportunity to consult his partner and other people. I again saw him next morning, and renewed our conference, at which time he refused to sign any agreement of any kind, and stated that, while he had been handling imitation products one

of which was "Ko-Nut," and that he had also purchased one barrel of "Koke" syrup from the Southern Koke Company of New Orleans, that he only sold these products in response to calls for "coke" and "dope." But he freely admitted that there was a possibility, and a probability, that considerable of these imitation products had been sold as and for "Coca-Cola" on request for "Coca-Cola," but didn't think he was in any way responsible for that. I did not use any obscene or vile language of any nature, kind, or character, when I **[1565]** interviewed Mr. Boyd. I was very emphatic with him, but used no unseemly language with him at all,—it wasn't necessary.

I then visited the place of business of Owsley & Beerman, of Kosciusko, Mississippi. After an investigation as to their business, and reports secured on the samples of syrup being sold as and for "Coco-Cola" by this concern, as not being "Coca-Cola," I called on Owsley and Beerman on February 11th, 1914, and took up with Mr. Owsley and Mr. Beerman the report of investigations that had been made. Both gentlemen admitted that they had been guilty of using an imitation product,—"Ko-Nut"—in large quantities; that they were first induced to buy this product in 1911, and between February, 1911, and the date of my visit, February 11th, 1914, they had purchased something like twenty-three barrels of an average of fifty gallons each of this "Ko-Nut" and had purchased about 250 gallons of "Coca-Cola" between February, 1911, and Feb-

(Deposition of H. B. Pierce.)

ruary, 1914. Both Mr. Owsley and Mr. Beerman freely admitted that their understanding of the terms "dope" and "coke" was that it meant "Coca-Cola," and that, when customers came to their fountain and made use of these terms, they meant and wanted "Coca-Cola." Mr. Owsley further stated, after our conference, that he was very glad I had come to see him; that they had been contemplating for a long while discontinuing the handling of imitation products; that he was thoroughly convinced that it was wrong, and had taken the matter up with Mr. Beerman a number of times with a view of stopping it, but that, in consequence of my visit, they would discontinue the **[1566]** handling of any imitation product which they would sell as and for "Coca-Cola"; and, in that connection, I secured a signed agreement from both Mr. Owsley and Mr. Beerman, containing those facts, together with waybills of the shipment referred to in that agreement. The paper marked Exhibit 118 is the agreement referred to.

(Plaintiff here tendered and offered in evidence the agreement referred to as Plaintiff's Rebuttal Exhibit No. 118.)

No, I did not use any obscene, or vile, or unbecoming language in the place of business of Owsley and Beerman, or any language that I couldn't use at all in the presence of ladies. I spent a very pleasant evening with Mr. Owsley. I never used any language that I couldn't use in the presence of ladies in any of these visits that I made. It wasn't neces-

sary. The facts themselves were always sufficient. No, I never visited the place of business of the Hyde Drug Company, at Ellisville, Mississippi, but I had some communication with them. Investigation was made in connection with their business during August, 1914, and a sample of the product being sold as and for "Coca-Cola" by this concern was secured, and analyzed, and reported not to be "Coca-Cola."

(Recitation as to what the reports showed is objected to by defendants because hearsay. Overruled. Exception.)

On August 25th, 1914, I wrote the M. W. Hyde Drug Company, of Ellisville, Mississippi, this letter dated August 25th, 1914, which was introduced as defendants' Exhibit No. 229. In reply to that letter I received a letter from the Hyde Drug Company signed by J. R. Kelly. Secretary and [1567] Treasurer 31st, 1914, which letter is marked Plaintiff's Exhibit No. 119. In reply to that letter I wrote to J. R. Kelly, secretary and treasurer of the Hyde Drug Company, of Ellisville, Miss., under date of September 3d, 1914, this letter marked Plaintiff's Exhibit 120.

(Plaintiff here tendered and offered in evidence the letters referred to as Plaintiff's Rebuttal Exhibits Nos. 119 and 120 respectively.)

On January 14th, 1914, accompanied by A. B. Freeman I went to Mr. Dalton's office in the Hennen Building, in New Orleans, somewhere around noon, and I stated to Mr. Dalton that I understood he had

(Deposition of H. B. Pierce.)

been formerly connected with the Southern Koke Company in an official capacity and that he had severed his connection with that concern, and desired to know the reason why he severed his connection. Mr. Dalton at first was very reticent, and stated that he didn't care to be mixed up at all with any of the controversies between the Southern Koke Company and anybody else; that he had just entered into a new business, the insurance business, and that he had made some friends, and that he didn't care for those friends to know that he had ever been connected with the Southern Koke Company, or ever had anything to do with it. Mr. Dalton ascertained the fact, however, that both Mr. Freeman and myself were Masons, and stated that he had become connected with the Southern Koke Company in June, or July, of 1913, for the purpose of selling stock for the concern, and that he had purchased some of the company's stock and also sold considerable of it to friends of his; that shortly after **[1568]** Mr. Scott's death he was made general manager of the concern. I questioned Mr. Dalton as to the methods by which the Southern Koke Company was doing business, and particularly as to the instructions of salesmen of that company in selling their product, and Mr. Dalton stated that it was the instructions of himself for the salesmen to go to the drug-stores, confectioneries, and others, who had soda-fountains, and inquire of them as to the amount of this "Coca-Cola" business and when that was ascertained, to say to the manager,

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or proprietor, "Why not give us part of your 'Coca-Cola' business, because 'Koke' is just the same as 'Coca-Cola,' the only difference being its name; that is made from the same formula as 'Coca-Cola,' that it will cost you considerably less than 'Coca-Cola' and you can make considerably more profit"; that if the dealer was to say "Well, when people use the term 'Coke' they mean and want 'Coca-Cola'" the salesman was to say "What difference does it make to you what they mean? they ask for 'Coke,' and you should give them 'Koke' "; "They will not know what you give them and there is absolutely no difference between 'Koke' and 'Coca-Cola.'" Mr. Dalton further said that J. C. Mayfield claimed to own one-fourth interest in the formula of "Coca-Cola," that he understood that to be so. We also talked to Mr. Dalton about where the Southern Koke Company obtained their trademark. He stated it was his understanding that they bought some small concern out who had the name "Koke" and that Mr. Mayfield had paid this concern about four hundred dollars for their recipe, as he called it. I asked Mr. Dalton whether the Southern Koke Company manufactured "Koke" under the recipe of the concern **[1569]** that Mayfield had bought out, and he first stated he didn't know, but, on his attention being called to the statement and claim of Mr. Mayfield that "Koke" was made from the formula of "Coca-Cola," he admitted that the recipe which was bought from the small concern couldn't be manufactured by the Koke Company. He fur-

(Deposition of H. B. Pierce.)

ther stated that the Southern Koke Company secured all their product in extract form from Van Deusen, of St. Louis, that it was not made by them, nor was it made by the Koke Company of America; that the branch plants were also furnished with this extract from Van Deusen, and they only added simple syrup to make it up in syrup form. Dalton said that he severed his connection with the Southern Koke Company some time during August of 1914, and, questioned as to why he severed his connection, he stated that he was not in accord with the character of the business, or the policy of running the same, and, also, that J. C. Mayfield had not treated him just right; but he wouldn't state what this treatment was; that he had, in severing his connection with the Southern Koke Company, compelled J. C. Mayfield not only to purchase the stock he had bought, but also to purchase the stock that he, Dalton had sold to his friends, and, pressed a little closer as to why he got out and why he didn't stay with the company, he again repeated that the business was not satisfactory to him, he didn't care to be identified with it. Asked about the advertising of the Koke Company, if he had ever seen any outside of New Orleans, Mr. Dalton stated he never had, that he didn't believe that in all of his travels around Mississippi and Louisiana he had ever seen any advertisements **[1570]** of the Koke Company. During our conversation, Mr. Freeman made a remark to Mr. Dalton something like "A business being conceived in iniquity and born in sin couldn't

(Deposition of H. B. Pierce.)

survive" and that statement was made in connection with a statement made by Mr. Dalton, who said that he believed that the Coca-Cola Company had made a serious mistake when they didn't buy up that "Koke" trademark and get it off the market. Mr. Freeman replied that he didn't think so, that "any business conceived in iniquity and born in sin couldn't survive," and about the time we were leaving Mr. Dalton, he repeated that phrase and stated, in connection with that, that was one of the reasons why he had severed his connection with the Koke Company, that "any business conceived in iniquity and borne in sin couldn't survive." That about concluded my interview, with this exception; all through that interview Mr. Dalton practically tried that he not be called as a witness, and practically prayed to get Mr. Freeman and I, as Masons, to absolve him from testifying. I wouldn't make any statement at all other than to say to him we would like very much to have his testimony, and he promised us in going away, that if we wouldn't put him up as a witness he wouldn't testify for the Southern Koke Company, or the Koke Company of America, or any of its allied interests, and stated that if they did call him as a witness, he would furnuish us with sufficient matter to protect us. Now, Mr. Dalton also stated as one of his reasons why he didn't care to be mixed up with this was that he was up for election in the Shrine, and he didn't care for the people—particularly the Shriners in New Orleans—to know he was ever connected **[1571]** with J. C. May-

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field or the Southern Koke Company. In addition to that, during our conversation we went into the question with Mr. Dalton as to the definition of the term "coke" particularly, and also "dope" as to his understanding of these names and as to what he had learned, and Mr. Dalton admitted freely that it was his understanding that the terms "coke" and "dope" were nicknames universally used and long recognized for "Coca-Cola," and that was, he believed, one of the reasons Mr. Mayfield had adopted the name of "Koke" taking technical advantage of that condition in the trade. I made the notes from which I have given the above testimony within one hour after I left Mr. Dalton—just time to go to the Hotel Monteleon, get the paper, make myself comfortable, and sit down and write it. I did not send a list of questions to Mr. Dalton, but Mr. Freeman did about ten days after that. The questions were based on that interview we had. We never received any reply from him.

Cross-examination by Mr. LITTLETON.

The first employment I ever had was with the James H. Nichols Construction Company, of Philadelphia, as office boy. The next employment I had after that was with the Pinkerton National Detective Agency, with which concern I have been connected for thirteen years. I was never in the employ of the United States Government, was never in the Treasury Department and never worked for that department. I severed by connection with the Pinkerton National Detective Agency and entered the

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employ of the Coca-Cola Company on August 28th, 1913. Prior to that time I had done work for [1572] Coca-Cola Company for about four years, the nature of which was making various investigations, practically in regard to fraudulent substitutions. I was superintendent of the Pinkerton National Detective Agency during part of the time I did this work for the Coca-Cola people, and I was assistant superintendent in Philadelphia part of the time. Altogether I have been doing work of this character for the Coca-Cola Company for five or six years. The position I now occupy with the Coca-Cola Company is that I have charge of all their investigating work in connection with fraudulent substitution, infringements and any other such investigations that the company requires. I have charge of the investigators, I was never admitted to the bar and never practiced law. I have, however, acted as counsel in this case and in other cases brought by the Coca-Cola Company against other companies, associated with other counsel. I examined the witnesses, associated with other counsel. The Coca-Cola Company, or Candler, Thomson and Hirsch, had six investigators or detectives employed investigating the facts with reference to this present suit—that is, six directly, namely, D. E. Bolton, F. C. Peace, S. Friend, C. C. Ross and Frank Pratt and T. M. Murphy. You ask how many investigators or detectives have been employed in the interest of the Coca-Cola Company in the present case; I cannot tell you that, I don't know—probably twenty-five or

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thirty. I don't know how many are employed from the offices of Reed & Rogers of Chicago, there is only one from their office that I know of. I should say the Coca-Cola Company has employed in this case twelve Pinkerton detectives, and one ex-chief of [1573] police that I know of. They have employed two different detective agencies, namely, the Pinkerton National Detective Agency and George H. Bodeker of Birmingham, Alabama. There was no detective agency employed in St. Louis that I know of other than the Pinkerton. If any other agency was employed it was entirely without my knowledge either then or now. Aside from the special detectives or representatives or investigators that were employed on this case, the entire sales force of the Coca-Cola Company, numbering ninety men, have been at work assisting the attorneys for the Coca-Cola Company in the preparation of this case. In addition to that, a few "Coca-Cola" bottlers in various localities have been assisting, together with the Dallas branch of the Coca-Cola Company, the manager thereof and the people connected with that office. However, none of the jobbers have given any assistance to my department. So far as I know there have been altogether directly and indirectly at work on this case in behalf of the Coca-Cola Company approximately 125 people. You say you notice in this list of detectives employed by the Coca-Cola Company, that I have left out the name of Boswell. He is no longer in the employ of the company —he wasn't for a year or more. But he was on this

case, yes, sir. I do not know where he is now. I don't believe he is with the Pinkerton people any more, but I don't know. He severed his connection with the company on account of excessive expense bills, and because incompetent generally. You ask what schooling, if any, I put these investigators and detectives through so as to render them competent for the work when I employ them; well, the majority of these **[1574]** investigators that I have there in this work with me for the Coca-Cola Company, came from the Pinkerton Agency and consequently had two or three years investigating, teaching and instruction; and other teaching of course, was not necessary—that is in this particular work. Now, if you ask what instructions they are given, that is something else. All of these parties I have mentioned, including Boswell, had been doing work of this character for the Coca-Cola Company prior to the time they entered the employment of the Coca-Cola Company directly, with the exception of Murphy and Ross. I was their superintendent in the Pinkerton National Detective Agency, and I put them through a general schooling in order to fit them for their work. You ask what was the nature of that schooling; well, the nature of that schooling, to begin with, was to put them with thoroughly experienced investigators, let them work with them for probably a month or two, so that they will understand how to make out the reports and secure information and various other work that may come to their attention. Of course, every particular piece

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of work a man is given, he is thoroughly instructed as to the general facts and the details desired, and told, of course, how would be the best general way to get at them. He is likewise under the instruction and charge of his superintendent or his assistant superintendent, who follows his daily reports carefully by reading them and if there is any errors or mistakes, either of omission or commission, he is corrected immediately either in person or by mail. You ask what instructions were given these parties when they went to work on this **[1575]** case; our instructions to our men, first, if we have a particular place to investigate, is to go to that place of business, but before going there to attach to themselves a disinterested witness, some man of good character who is a resident of that particular town; the first thing our men do in going into a place where they are investigating, is to go to the fountain and one of the men asks for "Coca-Cola," the second man, regardless of whether it is the witness or the operative—it don't make any difference at all—you say you didn't ask what they did, but what their instructions were; that is the instructions. One man goes to the fountain—one of the men asks for "Cola-Cola" and the other for "Dope." Both the operative and the witness are to observe the container in the fountain from which the syrup is drawn to make both of these drinks and also to note how that container in the fountain is labeled. They make no statement of any kind at that time. They come back in about another hour and duplicate the test, and one asks for "Coca-

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Cola" and the other asks for "Coke" and they again observe from what container in the fountain the syrup was drawn to make the drinks, noting, also, how it was labeled. They do that possibly four times, or maybe five times, that first day, alternating between "Coca-Cola," "Dope" and "Coke" one man always asks for "Coca-Cola" and the other asks for either "dope" or "coke." Now, for the second day's work they start off with the same spigot test again. That is what we call the spigot test. If there is only one particular fountain it is done at that place only, if they have three or four places, they alternate and do the three or four places all in the same day. On the scond day they are instructed again to go to the fountain and one **[1576]** ask for "Coca-Cola" and the other ask for "dope." They observe from what container in the fountain the syrups to make those drinks are drawn, and also how it is labeled, and make a note of that and make a note also of the time they go in, how long they stay there, and the time they come out, and in addition to that they also note the first and second days, or any number of days they stay there, how many other people come there and ask for "Coca-Cola," "dope" and "coke" and they observe also from what container in the fountain the syrup is drawn to make drinks in response to those calls. They not only make the actual test themselves, but make the test of observation and keep account of that. Now, after the second test is made, another spigot test is made in which they again go in and one asks for "Coca-Cola" and the other

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man asks for "Dope." Sometimes it is the witness and somtimes the investigator, who presents the dispenser with a six or eight ounce bottle with the request "Please be good enough to fill that with 'Coca-Cola' syrup" distinctly saying "Coca-Cola" so there will be no question as to what was asked for, and generally the dispenser fills the bottle with the syrup and both the witness and operative observe from what container in the fountain the syrup was drawn to fill that bottle. Through a pretense or otherwise they ascertain the dispenser's name, and immediately after doing that, if it is the operative who purchases the sample, he hands that sample to the witness, and they both then go to their room in the hotel where they seal the bottle with sealing-wax, and the operative has an identification seal which has his initials on it, and then some identifying mark such **[1577]** as the top of a telegraph pole, or a circle with an "R" in it, or a triangle with an "S" in it, each sample has its identifying mark as to the particular operative,—and he puts his stamp on that seal in the presence of the witness. He then immediately writes out a label, of which we have a printed form, giving all the facts of that purchase, the date, the name of the store, its location, the city and street location, the hour that they entered the store, what they asked for, how much was paid for it and also the container in the fountain from which the syrup was drawn to fill the order for the sample, together with the dispenser's name. And then that label is signed by the purchasing operative, or the

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witness, as purchaser, with the witness' name and address, city and state, and after that is placed on the bottle it is sealed in one or two places with the sealing-wax, with the identification seal on it, and then forwarded to me by express. Now, I have been speaking of this thing in the past tense, as though that was what was actually done; I mean these are the instructions that were given to the men, in this particular case. In some particular cases I instruct the witness,—rather the operative, after he has secured the second sample—which may be the third day that he is in that town, or possibly the fourth, it depends on the condition which he thinks is best suited to the purchase of the sample, to first ask to see the proprietor, and if he is not available, to ask to see the manager, and then introduce himself as a representative of the Coca-Cola Company and in a pleasant [1578] way to ascertain from that proprietor or manager what is his understanding of the term "Coke" and "Dope" as applied to a soda-fountain beverage. In special cases we sometimes remain in the town until we see a shipment of the imitation product on the freight platform about to be delivered to the dealer who we are operating on or investigating, in which case we take photographs of that barrel. We very often endeavor, you understand, that is their general instructions—if an opportunity presents itself to go to the rear of the dealer's store or in his cellar, and ascertain just what imitation product he has on hand. In a great many cases where the dealer states—and he does probably

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ninety-eight times out of a hundred or more—that his understanding of the term "Dope" and "Coke" means "Coca-Cola," we then request him to make what is termed a "consumer's test"—that is have one of the operatives stand at the fountain during an entire day and have the dispenser ask each and every customer that comes to the fountain and asks for a "Dope" or "Coke," what they mean—that is a "consumer's test." That is about all the instructions unless there is some particular or special case. Very often the nature of the case decides what instructions to give, but those are the general instructions. The particular instructions given in this case was nothing more or less than the "spigot test" and the "consumer's test." Those are the general instructions, but specific cases require sometimes specific instructions. We made a great number of investigations, probably three thousand. I have not the slighest idea what the investigation of facts in this case has cost the Coca-Cola Company to date. The Chicago detective mentioned above were under my direction when I was connected with the [1579] Pinkerton National Detective Agency, but not when they were operating on this case. They were under the instructions of the Chicago office. About four or five ex-employees of Mr. Mayfield and the Koke Company have been summoned by the plaintiff in this case and not placed upon the stand. George H. Bodeker handled that part of the testimony entirely. He and his detective Agency were employed to locate former em-

ployees of the Celery-Cola Company in Birmingham, Alabama, or wherever they could be found. That was an independent operation on his part; I had nothing to do with that. I do not know who assisted Mr. Bodeker in that work. I couldn't tell you how long C. J. Pogue worked assisting Mr. Bodeker. I myself served C. J. Pogue with a subpoena in this case. Mr. Bodeker did not report to my office or to the office of Candler, Thomson & Hirsch what Mr. Pogue was going to testify to, as far as I know, nor did he report to Mr. Rogers. The witneses as a rule are seen by counsel at some time before they go on the stand, but in this case, counsel had seen none of the witnesses at Birmingham up to the time they went into the witness-room and never talked to any of them at all. I was in Birmingham before counsel arrived. I was not with them all the time, and don't know what they did when I was not present. George H. Bodeker and his assistants were the only ones who saw the Birmingham witnesses. They did all of the corraling and produced them in the witness-room. Bodeker and his detective agency were employed in this case about March 5th, when we were in Birmingham taking the defendants' testimony. Mr. Bodeker was in the room during the taking of defendants' testimony and that is the time when he was employed. **[1580]** Mr. Harold Hirsch suggested to me the idea of issuing a subpoena *duces tecum* for C. J. Pogue. I do not know how much C. J. Pogue was paid for services in this case on behalf of the Coca-Cola Company. I don't know that he

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was paid anything other than $1.50 witness fee which I paid him. I don't know how many times Bodeker had seen Pogue before he was examined in this case. I don't know what information Pogue gave Bodeker other than the statement he made to him. Bodeker secured a statement from Pogue before the latter went on the stand. Just what that statement was I don't know, because I didn't go into any of the details as to what it was. I understand that statement was given sometime between March and June. I never saw Pogue in my life before this case came up. Bodeker was employed in this case to help locate the former employees in Birmingham of the Celery-*Coal* Company between the years 1901 and 1910. You ask if my crew was not competent to do that work themselves; we hadn't sufficient men—they had other work to do of equal importance, namely, making various investigations throughout a number of states of fraudulent substitution of "Coca-Cola." Part of their work included shadowing parties in this case and witnesses who testified in this case, namely Steve Mayfield. Three men were employed to shadow Steve Mayfield, namely, Sam Friend, Frank Platt and a young fellow named Daniels. These men were arrested for shadowing him and were fined twenty-five dollars each. George H. Bodeker is said to have made their bond. I should say the Coca-Cola Company had been working on this case about a year before these suits were brought, possibly two years. **[1581]** It is possible that they were working on this case as early as 1912. I learned

through reports received at this office that detectives were put on the trail of J. W. Mayfield in Chicago. I received copies of the reports from the detectives. There were two detectives trailing J. W. Mayfield in Chicago, namely, a man named Veil and another by the name of Favaculo. These were Pinkerton operators. I received reports from probably three other detectives there, Marble, Wolff and W. J. Burns, and a man named Schrott. The six detectives, D. E. Bolton, F. O. Peace, S. Friend, Frank Platt Murphy, and Ross, and formerly Boswell, were employed regularly by the Coca-Cola Company. They were not employed however before this suit was brought. They were not employed just to work on this case, but were taken into the employment of the Coca-Cola Company on that work regularly when that department was organized in September, 1913. None of these boys were employed before April, 1914. Peace was the first one employed and in the interval the Pinkerton National Detective Agency did the investigation work. Since that time these men and others have been constantly employed going about the country investigating soda-fountains throughout the south. They slip up unawares at various soda-fountains—the soda-fountain men don't know they are present and make secret investigations as to what is going on there. It is a fact that at various times they have gone to the railroad offices to ascertain what products the customer was getting,—what shipments, who it was from, and what the character of the shipment was, and at times photo-

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graphs have been made of the shipments going to customers, and en route to customers. Myself and my men acting in behalf of the [1582] Coca-Cola Company have gotten, I should say, one hundred dealers to sign agreements similar to plaintiff's rebuttal Exhibits 110, 116, 117 and 118. I would say it was just about one hundred—possibly a few more. Shipments of "Coca-Cola" to these parties were made after these agreements were signed, presumably under the understanding between us contained in those agreements. Plaintiff's Rebuttal Exhibit No. 110 is a multigraphed form on the stationery of Candler, Thomson and Hirsch—bearing the watermark of Candler, Thompson & Hirsch. A large number of these was prepared. About ninety contracts similar to Plaintiff's Rebuttal Exhibit No. 110 were signed. These particular contracts were procured by Mr. Bolton and Mr. Peace, and then we procured some through attorneys, and we procured some through the mail.

XQ. 221. "I wish you would produce and file, as Defendants' Rebuttal Exhibits Nos. 8 to 98, inclusive all of the agreement similar to Exhibit No. 110.

(Mr. HIRSCH.—"And which we now tell counsel most positively we refuse to do that they are not concerned in this case in any way, shape, form or fashion.)

(Mr. LITTLETON.—"I call on the witness to produce those papers, and I would like to have the witness answer in the record.)

(Deposition of H. B. Pierce.)

(A. "On the advice of counsel, I refuse to file the papers mentioned.)

(Mr. HIRSCH.—"They are furthermore not in the possession of the witness—he has got nothing to do with them—they are not in his possession at all.")

[1583]

These contracts are in the possession of the General Counsel for the Coca-Cola Company. I have charge of the filing of them and the files are under my care, and if anything is wanted out of the files I go and get it, but I do so only with the permission of counsel. This form of contract, Exhibit No. 110, was prepared during the summer of 1914. Neither the men that are under me, nor anyone else in the employ of the Coca-Cola Company or acting in its behalf is now engaged in securing contracts of this character. I have not had any of these contracts secured by any of my men since the latter part of the fall of 1914. Yes, sir, I am absolutely certain of that fact now. I am certain of that from the simple fact they have taken up other work—investigations. That is my recollection of about when we stopped taking agreements, and resumed making investigations. I should say we stopped in the latter part of the fall or the forepart of the winter, or possibly the winter—maybe December.

You ask whether it was before October 15th, 1914; well, it may have been after. Yes, I have contracts of this character similar to Exhibits No. 110 that were secured subsequent to October 14th, 1914.

(Deposition of H. B. Pierce.)

XQ. 236. "I now call on you to produce those contracts and file them.

(Mr. HIRSCH.—"And I advise him not to do it—he hasn't control of them and cannot do it. They are not in his possession or control.")

A. "On advice of counsel, I refuse to produce and file them—they are not in my possession." **[1584]**

(Mr. LITTLETON.—"I now call on counsel for the Coca-Cola Company to produce and file all of the contracts secured by the Coca-Cola Company, or by its agents, or other persons acting in its behalf, since and subsequent to October 15th, 1914.")

(Mr. HIRSCH.—"Which I refuse to produce, as being entirely irrelevant and immaterial and not pertaining to this case in any way, shape or form.")

You call my attention to the fact that a contract made with A. E. Sharp, of Jacksonville, Florida, in February, 1915, was procured by an agent of the Coca-Cola Company and you ask if there is any difference between that contract and this Exhibit No. 110; that contract is already exhibited.

(Mr. HIRSCH.—"Any contract that counsel specifies that they want and that is relevant to this case, or where a witness has testified in this case, we will be more than glad to produce; but just to say 'produce all of them' at random, we refuse to do that."

The A. E. Sharp contract was put in as Defendants' Exhibit No. 15. I am presented with Defendants' Exhibit No. 15 and my attention is called to the fact that this contract is an exact duplicate of Plaintiff's Rebuttal Exhibit No. 110, and is dated the 2d

(Deposition of H. B. Pierce.)
day of February, 1915, and I am asked whether or not my recollection is now refreshed concerning the fact that contracts similar to Plaintiff's Rebuttal Exhibit No. 110 were procured subsequent to 1914; it is possible, an isolated case or two. I cannot tell what other contracts similar to this Exhibit No. 110 were procured in the year 1915. I have the means of finding out and will investigate my files and ascertain if any other **[1585]** contracts similar to this were made in the year 1915.

(Mr. HIRSCH.—"It is admitted that contracts similar to Plaintiff's Rebuttal Exhibit No. 110, and Defendants' Exhibit No. 15, have been procured by the Coca-Cola Company subsequent to October 15th, 1914, and during the year 1915, and the Coca-Cola Company intends to procure other contracts similar to that when similar circumstances arise.")

No, sir; the policy of procuring these contracts like Exhibit 110 and Defendants' Exhibit No. 15, has not been discontinued by the Coca-Cola Company. You ask that question direct, and I will answer it direct. It was only discontinued temporarily. I cannot say whether or not any contracts similar to the Exhibits referred to were procured from any other customers of any of the Koke Companies which are defendants in this case. I will make an examination of my files, and if I find any such contracts will produce and file them. I said that about ninety per cent of the contracts procured from customers, were similar to Exhibit No. 110 and Defendants'

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Exhibit No. 15. That would leave about ten other kinds of contracts. There may be a few more than that. It is a fact that the contract which I myself secured dealers to make and enter into were contracts which I wrote out myself in long hand. I myself have procured from, I should say, ten to fifteen such contracts. I have endeavored to get, and found that I could not get about for such contracts. I don't know how many contracts similar to Exhibits 110, 116, 117 and 118 my men have endeavored to get and found they couldn't get, it is a small number, the percentage is small, about possibly fifteen or twenty. [1586] Approximately one hundred and fifty people were approached either by myself or by my agents with the intention of getting them to sign contracts of this character. I do not recall their names. They were not dealers in "Koke" that I knew of. Prior to the time I went on this trip through Mississippi about February 11th, 1914, I had been out in Arkansas doing this same character of work out there. I have nothing to do with the contract similar to Plaintiff's Rebuttal Exhibit 111, 112, 113, and 114. I don't even know their contents. I don't know anything about why they have the provisions which they have. You ask what unpleasantness, if any, occurred at the Owl Drug Store, at Hattiesburg, Mississippi, on the occasion of my evening visit, at the time of my departure; I returned to the Owl Drug Store about 8:30. Mr. Williams was in the center of the store at the time and I approached

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him and asked him what decision his brother had come to regarding the entering of the agreement, and he immediately proceeded to lose his temper and said he would have nothing to do with the damned agreement and not to bother him about it. I said words similar to this: "That is not the proper spirit in which you and I should get together, let's talk this over." He said, "No, I have done all the talking I intend to do." "Well," I said, "now you and I can get together on this proposition and be good friends and all that sort of thing, and the Coca-Cola company too." Then he turned around and said, "You let me alone." I said, "I am not doing anything to you." And laughed at him. He says, "You get out of here and let me alone." "Well," I said, "I don't propose to do a thing, just merely to talk to you." "Well," he said, "You [1587] get out of here and let me alone," and with that he walked back to the prescription counter with the young man he was with, and I walked back and said, "Seeing the disposition you are in, I might as well say good-bye to you," and he then said, "Yes, you and all the damned lot of you get out of here and stay out of here." I said, "All right, Mr. Williams; good night." That is the sum total of the occurrence. Mr. Williams had been "tanking up" during the afternoon, evidently. No, sir, there was no physical encounter of any sort. There was no encounter between my body and his foot. You ask me to explain in detail the manner in which I approached Mr. Jones of the Yellow Pine Pharmacy. I approached